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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 157.

THE UNITED STATES OF AMERICA EX REL. CHARLES PARSONS, PLAINTIFF IN ERROR,

vs.

CHARLES I. LEEDS, THE MAYOR, AND THE ADMINISTRATORS OF THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 22 1876.

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1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

THE UNITED STATES ON THE RELATION OF Charles Parsons *vs.* CITY OF NEW ORLEANS. } No. 7913.

Petition for mandamus.—Filed June 5th, 1876.

To the honorable the judges of the circuit court of the United States in and for the fifth circuit and district of Louisiana.

The petition of the United States of America upon the relation of Charles Parsons, a citizen of New York, respectfully shews:

That on the 28th day of February, 1876, a judgment was rendered in this honorable court in favor of said relator against the city of New Orleans, a corporation by the laws of the State of Louisiana; that said judgment was for the sum of seventy-six thousand dollars, with
2 interest at the rate of six per cent., payable semi-annually on the first days of January and July of each subsequent year, with interest on instalments of interest as they accrue and costs; that upon said judgment a writ of fieri facias has duly issued to the marshal of the United States for the district of Louisiana; that the same has been returned nulla bona after due demand of said city of New Or

That said judgment was obtained upon obligations of the c Orleans, issued pursuant to acts of the legislature of the Stat iana, approved March 15th, 1854, viz, ~~fifty~~ bonds of one thous each for the subscription by the city of New Orleans to the s ... of the New Orleans, Jackson and Great Northern Railroad Company, in strict conformity with the act No. 109, approved as aforesaid, and ~~twenty-six~~ bonds of one thousand dollars each for under the act approved as aforesaid, No. 108, providing for the subscription by the city of New Orleans to the stock of the New Orleans, Opelousas and Great Western Railroad Company.

3 That the city of New Orleans is a corporation existing under series of statutes formed by the general assembly of the State of Louisiana.

That after the cession of Louisiana to the United States, at the first session of the legislative council of the Territory of Orleans, an act to incorporate the city of New Orleans was passed and duly approved conferring powers and correlative duties upon the mayor and city council, making them capable of holding and conveying any estate, real or personal, for the use of said corporation, and empowering them to raise by tax in such manner as to them may seem proper upon the real and personal estate within the said city such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving, and watering the streets of the said city; for supporting the city watch, the levee of the river, the prisons, workhouses, and other public buildings, and for such other purposes as the police and good government of the said city may require.

That said corporation, by its name, they and their successors
4 were declared to be known in law, and be capable of suing and being sued, and of defending in all courts and in all actions and matters whatsoever.

1 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

THE UNITED STATES ON THE RELATION OF Charles Parsons
vs.
CITY OF NEW ORLEANS. } No. 7913.

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2 interest at the rate of six per cent., payable semi-annually on the first days of January and July of each subsequent year, with interest on instalments of interest as they accrue and costs; that upon said judgment a writ of fieri facias has duly issued to the marshal of the United States for the district of Louisiana; that the same has been returned nulla bona after due demand of said city of New Orleans.

That said judgment was obtained upon obligations of the city of New Orleans, issued pursuant to acts of the legislature of the State of Louisiana, approved March 15th, 1854, viz, ~~fifty~~ sixty bonds of one thousand dollars each for the subscription by the city of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company, in strict conformity with the act No. 109, approved as aforesaid, and ~~twenty-six~~ bonds of one thousand dollars each for under the act approved as aforesaid, No. 108, providing for the subscription by the city of New Orleans to the stock of the New Orleans, Opelousas and Great Western Railroad Company.

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That said corporation, by its name, they and their successors
4 were declared to be known in law, and be capable of suing and being sued, and of defending in all courts and in all actions and matters whatsoever.

That said city, in the form and manner of its government, and in the extent of territory, received as to its charter various modifications by subsequent acts of the general assembly, but in all, the powers of the original charter and the duties implied were retained, it being declared at various times and in various acts that all the powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the government of the same, were conferred.

That by an act entitled "An act to consolidate the city of New Orleans and provide for the government and administration of its affairs," No. 71 of the acts of the general assembly, approved February 23rd, 1852, after conferring the powers heretofore recited, and confirming the powers before existing, and after providing for the creation of a loan to pay the existing debt of said city, it was declared that "from and after
5 the passage of this act no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans, or under its authority; nor shall any loan be contracted unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council after ten days' proclamation by the mayor in the newspaper chosen by the common council, and no ordinance creating a debt or loan shall be valid unless for some single object or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, & for the full and punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinance shall not be repealed until principal and interest of the capital borrowed or the debt incurred are fully paid and discharged."

That the said general assembly of Louisiana in the same year,
6 by act approved March 12th, 1852, No. 175, passed an act providing for the subscription by the parishes and municipal corporations of this State to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of the stock so subscribed.

That powers and duties were given and impowered to levy taxes for stocks subscribed, upon the real and personal property situated within the parishes or municipalities.

That under the powers conferred by said act the city of New Orleans passed ordinances by which the said city subscribed for eighty thousand shares of the stock of the New Orleans, Jackson and Great Northern Railroad Company, amounting to two millions of dollars, and levied a tax of three per cent. on all the landed estate situated in the city of New Orleans, payable in six annual instalments, on 1st Monday of May, 1853, and the same date of the five following years.

A like ordinance was passed subscribing to the stock of the New
7 Orleans, Opelousas and Great Western Railroad Company, and providing for the levy of a tax payable in the same time.

That said subscriptions were made, and said taxes levied, and the first instalment collected.

That the said ordinances, subscriptions, and levies were in strict accordance with the provisions of the statutes of the State aforesaid, and ratified and approved by the people upon a vote duly taken.

That thus a tax was bearing heavily, collectable in a brief space of time, that after the experience of a year or more it was found that this subscription was of little avail to the railroads, as it could not be used in time to prosecute the work of constructing said roads, and at

the same time the tax levied in such proportions and for such large sums in such short time was onerous and oppressive to the property owners.

To improve and relieve both interests, the acts Nos. 109 and 103 were passed March 15th, 1854, by the general assembly of Louisiana, that a special tax on real estate and slaves was directed to be levied in
8 January of each year sufficient to pay the annual interest on said bonds, and specifying the rate of said tax to be collected at the same time, as the consolidated loan tax of said city, that the stock of said companies issued to the city of New Orleans was to remain pledged for the redemption of said bonds, that the ordinances approved May 15 and 17th, 1842, were to be repealed so far as the taxes of 1854 and subsequent years, being five instalments in all, were to be levied and collected.

That the said acts were accepted in terms by the city, and the ordinances relating thereto duly ratified by the people; that upon the faith of those various acts and ordinances the said bonds were delivered to the said railroad companies respectively, in a negotiable form and duly negotiated.

That the city of New Orleans has disposed of the stock received by said companies, and the same cannot be reached by process of execution and indeed is entirely worthless.

9 That said city of New Orleans through its mayor and administrators has been requested to levy and collect and pay over to relator taxes sufficient to satisfy the judgment of relator as aforesaid, and her refusal. That they have thus failed in the performance of their duty.

That the only relief afforded to your relator is a writ of mandamus directed to said mayor and administrators, the council of said city of New Orleans, to levy and collect and pay over to petitioner a tax upon the real and personal property, situated within the corporate limits, sufficient to satisfy the principal and interest of the judgment aforesaid.

Wherefore, he prays that a writ of mandamus issue to said mayor and administrators, the city council of New Orleans, directing them to levy and collect a tax upon the real and personal property situated within the limits of said city, sufficient to pay said judgment for seventy-six thousand dollars and interest at six per cent., payable semi-annually on the first days of January and July, 1875, and in the first days of
10 January and July of each subsequent year, with interest or instalments of interest as they accrue and costs, or that they shew cause (if any they have), on Friday, June 9th, 1876, at 11 o'clock a. m., to the contrary.

(Signed) CLARKE, BAYNE & RENSHAW,
For Relator.

Tho's Allen Clark, being duly sworn, deposeth and saith he is of counsel for Charles Parsons, relator, who is absent from the State; that the allegations of the foregoing petition are true to the best of his knowledge and belief.

(Signed) THO'S ALLEN CLARK.

Sworn to and subscribed before me this 5th June, 1876.

(Signed) F. B. VINOT,
U. S. Commissioner.

Let the alternative writ of mandamus issue as prayed for, returnable on the 9th day of June, 1876, at 11 a. m.

(Signed) EDWARD C. BILLINGS.
Judge.

11 *Marshal's return.*

Received June 6th, 1876, by the U. S. marshal, and on the same day served a copy hereof on the City of New Orleans, by handing the same to C. J. Leeds, mayor of said city, in person, in this city.

(Signed) S. B. PACKARD,
U. S. Marshal,
By S. W. REED, *Deputy.*

Answer.—Filed June 9th, 1876.

U. S. circuit court, dist. of Louisiana.

THE UNITED STATES, ON THE RELATION OF Charles Parsons, *vs.* CITY OF NEW ORLEANS. } No. 7913.

Now comes the city of New Orleans, and the mayor and administrators of said city, by Charles J. Leeds, the mayor thereof, and for answer to the petition of the relator, Charles Parsons, they allege and show:

That they admit that the said relator has recovered judgment
12 against the city of New Orleans; that an execution has issued and been returned "no property found," as more fully appears from the record in the suit of Charles Parsons vs. The City of New Orleans, No. 7425 of the docket of this court, which record is specially referred to and made part of this return as an exhibit.

And further answering, these respondents say that said judgment was recovered upon certain bonds, and for the principal thereof, made by the city of New Orleans, for one thousand dollars each, issued by the said city to the New Orleans, Jackson and Great Northern Railroad Company and to the New Orleans, Opelousas and Great Western Railroad Company under the authority of the acts of the legislature of the State of Louisiana, Nos. 108 and 109, approved March 15th, 1854, as appears from said record and the petition herein.

And further answering, these respondents say that no tax whatever for the payment of the principal of said bonds is directed to be levi d or collected by the said acts, or by any other acts of the legisla-
13 ture or provisions of law, and these respondents refer to said acts, and especially to the second section thereof, to shew the absence of such provisions; and these respondents shew that, so far as respects the interest upon the said bonds, provision has been regularly made and a tax levied to provide for the payment of the same.

Forasmuch, therefore, as the laws of Louisiana have directed no tax to be levied or collected to pay the principal of said bonds, these respondents are wholly without authority to levy and collect said tax, and have no duty to perform in the premises, and this honorable court is without authority to grant the writ of mandamus prayed for.

Respondents, further answering, say that the ordinances of the city of New Orleans, approved May 15th & 17th, 1852, and set forth in the petition of relator, were repealed by the said acts No'. 108 and 109 aforesaid of 1854, and that said acts were passed, ordinances repealed, and the same accepted by the said railroad companies before the said bonds were created or issued, and long before said railroad companies
14 had endorsed and negotiated them to relator or his authors.

Respondents further say that by the said acts the stock held by

the city in the said railroad companies was pledged forever for the redemption of the said bonds; that the stock in the New Orleans, Opelousas and Great Western Railroad Company is still in the possession of the city, and the stock of the New Orleans, Jackson and Great Northern Railroad Company, if disposed of by the former city authorities, was illegally disposed of, and is still subject to the pledge in favor of the said bondholders, and respondents say that relator must first resort to said stock for payment of his said bonds before he can demand payment from any other fund.

Wherefore these respondents pray for judgment in their favor, that the petition of the relator be dismissed with costs, and for general relief.

(Signed) B. F. JONAS,
City Attorney, of Counsel.

15 Charles J. Leeds, mayor of the city of New Orleans, being duly sworn, says that all the facts and allegations in the foregoing petition contained are true and correct.

(Signed) CHA'S J. LEEDS,
Mayor.

Sworn to and subscribed before me this 8th day of June, 1876.

[SEAL.] (Signed) W. T. HOUSTON,
First Justice of the Peace.

Exhibit referred to in above answer is record № 7425, and transcribed on page 20.

Demurrer to answer—Filed June 9th, 1876.

United States circuit court, 5th circuit, district of Louisiana.

THE UNITED STATES OF AMERICA, ON RELATION of Charles Parsons,
vs.
THE CITY OF NEW ORLEANS.

And the said plaintiffs, as to the return made by the said city, the mayor and administrators thereof, say that the said return is insufficient in law in manner and form, as the same is set forth therein, as to the matters therein contained; therefore, for want of sufficient
16 return in this behalf, they pray for a peremptory writ of mandamus as prayed in their petition.

(Signed) CLARKE, BAYNE & RENSHAW,
For Pl'ff.

Order demurrer overru'ed and writ of mandamus denied.—Extract from minutes April term, 1876.

NEW ORLEANS, *Friday, June 9th*, 1876.

Court met pursuant to adjournment. Present: Hon. E. C. Billings, district judge.

UNITED STATES, ON THE RELATION OF Charles Parsons,
vs.
CITY OF NEW ORLEANS. } No. 7913.

This cause came on to be heard on the petitioner's application for a mandamus, and was submitted by Clark, Bayne, and Renshaw for peti-

tioner, and B. F. Jonas for the defendant, upon the petition, answer, and demurrer to answer.

On consideration whereof it is ordered and decreed that said demurrer be overruled and a writ of mandamus denied, with costs.

17 *Motion and order for writ of error.—Extract from the minutes April term* 1876.

NEW ORLEANS, *Saturday, June 10th*, 1876.

Court met pursuant to adjournment. Present: Hon. Edward C. Billings, district judge.

UNITED STATES, ON THE RELATION OF Charles Parsons, *vs.* CITY OF NEW ORLEANS. } No. 7913.

On motion of Clark, Bayne, and Renshaw, of counsel for plaintiff, ordered that a writ of error be granted returnable in the Supreme Court of the United States, on the 2d Monday of October next, in favor of said plaintiffs as to the judgment this day signed, the relator giving bond and security in the sum of five hundred dollars, said bond to be approved by the clerk.

Bond for writ of error.—Filed June 12th, 1876.

Know all men by these presents that we, Charles Parsons, as principal, and James M. Scott, as surety, are held and firmly bound unto
18 the city of New Orleans, the mayor and administrators thereof, in the full and just sum of five hundred dollars, to be paid to the said The city of New Orleans and the mayor and administrators thereof, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals, and dated this twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas, lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Charles Parsons is relator and the city of New Orleans defendant, judgment was rendered against the said Charles Parsons, relator; and the said Charles Parsons, relator, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said The city of New Orleans,
19 the mayor and administrators thereof, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the 2d Monday of October next.

Now, the condition of the above obligation is such that, if the said Charles Parsons shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) CLARKE, BAYNE & RENSHAW, [L. S.]
For CHARLES PARSONS.
(do.) J. M. SCOTT. [L. S.]
Sealed and delivered in the presence of—
(Signed) F. B. VINOT.

Approved June 12th, 1876.
(Signed) F. A. WOOLFLEY,
Clerk U. S. Circuit Court, District of Louisiana.

DISTRICT OF LOUISIANA:

James M. Scott, surety on the within bond, being duly sworn, says that he resides in the city of New Orleans, Louisiana; that he is worth the sum of five hundred dollars over and above his debts & liabilities and property exempt from execution.

(Signed) J. M. SCOTT.

20 Sworn to and subscribed before me this 12th day of June, 1876.

(Signed) F. B. VINOT,
U. S. Comm'r.

Exhibit referred to in defendant's answer.

United States circuit court.

CHARLES PARSONS
vs.
THE CITY OF NEW ORLEANS. } No. 7425.

Petition.—Filed May 28th, 1876.

To the honorable the judges of the circuit court of the United States for the fifth judicial circuit, district of Louisiana:

The petition of Charles Parsons, a resident and citizen of the State of New York, respectfully represents:

That the city of New Orleans, a municipal corporation, created by law, of the State of Louisiana, and a resident and citizen of said State, is justly and truly indebted unto your petitioner in the full sum of seventy-six thousand dollars, with interest at the rate of six per cent. per
21 annum, payable semi-annually, for this, to wit: That petitioner is the holder and owner of seventy-six bonds, each for the sum of one thousand dollars, with interest at the rate of six per cent. per annum, payable semi-annually, issued by said city of New Orleans.

That of said bonds, sixty (of which fifty-two are dated May 1st, 1854, and eight are dated January 1st, 1855,) are payable to the New Orleans, Jackson and Great Northern Railroad Company or their assigns, with interest; said bonds being of a series of two thousand of the same tenor, authorized to be issued to the New Orleans, Jackson and Great Northern Railroad Company in payment of the subscription to the stock of said company, and transferable by the endorsement of the president and secretary of said company; and said bonds were endorsed by said president and secretary, and were thereby transferred to petitioner.

That said bonds were issued under the seal of the city of New Orleans and the signatures of the mayor, treasurer, and comptroller of said city in pursuance of an act of the legislature of Louisiana of
22 March 15th, 1854, and in conformity with the provisions of an ordinance of the common council of said city approved , entitled "An ordinance providing for the subscription, by the city of New Orleans, to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and ratified by the qualified voters of the said city of New Orleans at an election held April 21st, 1854."

That said bonds are of series lettered B, and are numbered 413, 462 to 480, both inclusive; 432, 600 to 602, both inclusive; 606, 723 to 732, both inclusive; 743 to 746, both inclusive; 832, 982, 983, 1692, 1693, 1694, 1695, 1696, 1697, 939, 1432, 1482, 1698, 1734, 1882, 1883, 1884, 1885, 1886, 1887, 1890.

Petitioner avers that the sixteen remaining bonds were issued by said city of New Orleans, being of a series of fifteen hundred bonds authorized to be issued to the New Orleans, Opelousas and Great Western Railroad Company in payment of the subscription of the city of New Orleans to the capital stock of said companies; said bonds being transferable by endorsement of the president and secretary of said company.

23 Petitioner avers that said bonds were so endorsed by the president and secretary of said company to any bearer thereof, that said bonds were issued by said city of New Orleans under its seal and the signatures of its mayor, treasurer, and comptroller, in pursuance of an act of the legislature of Louisiana, dated 15th March, 1854, and in conformity with an ordinance of the common council of said city of New Orleans, approved April 7th, 1854, which ordinance was ratified by the qualified voters of said city of New Orleans, April 21st, 1854.

That said bonds are payable to the New Orleans, Opelousas, and Great Western Railroad Company, or their assigns, and are transferable by endorsement as stated, and have been duly transferred to your petitioner; that said bonds are of series lettered C, and are numbered 1033, 1034, 519, 520, 932, 934, 976, 929, 1010, 521, 522, 1178, 1445, 1448, 1449, 1441, and that of said bonds eleven are dated May 1st, 1854, and one is dated Sept'r 1st, 1854, and four are dated April 1st, 1855.

24 Petitioner avers that all of said seventy-six bonds are payable twenty years after date, and bear interest at the rate of six per cent. per annum from date, payable semi-annually on the first day of January and first day of July of each year, all of which appear by reference to said bonds, and the endorsements thereon, and the interest coupons attached.

Petitioner avers amicable demand, and that although the city of New Orleans admits that said bonds and interest are due, refusal to pay the same.

Wherefore petitioner prays that the city of New Orleans, through its mayor, Charles J. Leeds, may be cited to answer this petition, and that after due proceedings there be judgment in favor of plaintiff, the petitioner, and against the city of New Orleans, for the sum of seventy-six thousand dollars, with interest at six per cent. payable semi-annually on the first day of January and first day of July, 1875, and on the first day of January and July each subsequent year, with interest on the instalments of interest as they accrue, and petitioner asks for costs & for all equitable and general relief.

(Signed) CLARKE, BAYNE & RENSHAW;
Atty's for Pet'r.

25 *Verdict written on petition.*

NEW ORLEANS, *Febr'y 28th*, 1876.

We, the jury, find verdict for plaintiff in the sum of seventy-six thousand dollars ($76,000.00), with interest at six per cent., payable semi-annually on the first days of January and July, eighteen hundred and seventy-five, and on the first days of January and July of each subsequent year, with interest on installments of interest as they accrue.

(Signed) P. J. MALONEY,
Foreman.

Citation.—Issued 28th May, 1875.

The President of the United States of America to the marshal of the district of Louisiana, greeting:

CHARLES PARSONS
vs.
THE CITY OF NEW ORLEANS. } No. 7425.

You are hereby commanded to summon the City of New Orleans, through its mayor, Charles J. Leeds, to comply with the demand of Charles Parsons, a citizen of the State of New York, contained in the petition, of which a copy accompanies this citation, or to deliver
26 its answer to the same in the office of the clerk of the circuit court of the United States, fifth judicial circuit and district of Louisiana, in the city of New Orleans, in ten days after service hereof, as judgment will be rendered against it by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held. And that you make due return hereof on the first Monday of July, 1875.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 28th day of May, A. D. 1876, and of the Independence of the United States of America the 99th year.

[SEAL.] (Signed) F. A. WOOLFLEY, *Clerk.*

Marshal's return.

Received May 28th, 1875, by the U. S. marshal, and on the 31st day of same month and year served a copy of within citation and accompanying petition on the City of New Orleans named herein, by
27 handing the same to mayor, C. J. Leeds.

New Orleans, June 8th, 1875.

(Signed) S. W. REED, *D'y U. S. Marshal.*

Answer.—Filed June 7th, 1875.

U. S. Circuit court, dist. of La.

CHARLES PARSONS
vs.
THE CITY OF NEW ORLEANS. } No. 7425.

Now comes the City of New Orleans, herein cited as defendant, and for answer to plaintiff's petition denies all and singular the allegations thereof, and prays to be hence dismissed with costs, and for general relief.

(Signed) B. F. JONAS, *City Att'y.*

Judgment.—Extract from judgment-book, November term, 1875.

NEW ORLEANS, *Monday, February 28th*, 1876.

Court met pursuant to adjournment. Present, Hon. W. B. Woods, circuit judge.

CHARLES PARSONS
vs.
CITY OF NEW ORLEANS. } 7425.

28 By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Charles Par-

sons, do have and recover from the City of New Orleans, a municipal corporation created by the law of the State of Louisiana, and located in the parish of Orleans, the sum of seventy-six thousand dollars, with interest at six per cent., payable semi-annually, on the first days of January and July, 1875, and on the first days of January and July of each subsequent year, with interest on instalments of interest as they accrue, and costs of suit.

Judgment rendered February 28th, 1876.

Judgment signed March 6th, 1876.

(Signed) W. B. WOODS, *Judge.*

Fieri facias.—Issued May 18th, 1876.

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

29 You are hereby commanded that you demand from the City of New Orleans the sum of seventy-six thousand dollars, with interest at six per cent., payable semi-annually, on the first days of January and July, 1875, and on the first days of January and July of each subsequent year, with interest on installments of interest as they accrue, and costs of suit—clerk's costs, $41; atty's fee, $20, casb, which Charles Parsons lately recovered by judgment of the circuit court of the United States for the 5th circuit and district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said City of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said City of New Orleans in your district, and that you have those moneys before our said court, to render to the said Charles Parsons for the judgment aforesaid,

30 on the 30th day from the date hereof, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 18th day of May, A. D. 1876, and 100th year of the Indepen'ce of the United States.

[SEAL.] (Signed) F. B. VINOT, *D'y Clk.*

Marshal's return.

Received May 18th, 1876, by the U. S. marshal, and on the 23rd day of May, 1876, demanded of the mayor of the City of New Orleans the payment of the within amount of judgment, interest, and costs, who refused to pay the same. I then asked him to point out property of the defendant sufficient to satisfy said writ, which he failed to do. I then asked the plaintiff to point out property of the defendant, which he also failed to do; and being unable myself to find any property of the defendant, I return this writ not satisfied.

New Orleans, May 24th, 1876.

(Signed) S. B. PACKARD,

31 *U. S. Marshal,*

By JOHN FAHY,

Deputy Marshal.

32 *Admission and agreement.—Filed July 24th, 1876.*

United States circuit court. No. .

CHARLES PARSONS
vs.
THE CITY OF NEW ORLEANS.

It is admitted that the bonds referred to in the plaintiff's petition in suit No. 7425, upon which judgment was obtained, was and are all of the same tenor and description of the bonds copied into the transcript; and it is agreed that only one bond may be copied into the transcript, and this copy shall be accepted as copy of all the other bonds referred to in any and all of the proceedings herein, and no objection shall be made that other bonds, which are all of similar tenor and description, are not copied; and the record and transcript shall be complete without copying more than one of said bonds.

(Signed) CLARKE, BAYNE & RENSHAW,
Att'ys for Complainant.

(Signed) B. F. JONAS,
Att'y for Defendant.

33 *Bond of the city of New Orleans.—Filed Feb'ry 28th, 1876.*

$1,000.] [$1,000.

CITY OF NEW ORLEANS, STATE OF LOUISIANA.

No. 744. B.

Know all men by these presents that the city of New Orleans is indebted to the New Orleans, Jackson and Great Northern Railroad Company, or their assigns, in the sum of one thousand dollars, which sum the said city promises to pay in lawful money of the United States, at the office of the city treasurer, to the said New Orleans, Jackson and Great Northern Railroad Company, or their assigns, in twenty years from the date hereof, with interest at the rate of six per cent. per annum, payable semi-annually on the first day of May and on the first day of November in each year on the delivery of the interest-coupons attached, in the city of New York, at such bank as the comptroller of the city of New Orleans shall *deliver*.

This bond is one of a series of two thousand of the same tenor authorized to be issued to the New Orleans, Jackson and Great Northern Railroad Company in payment of the subscription of the city
34 of New Orleans to the capital stock of said company for two millions of dollars, transferable by the endorsement of the president and secretary of said company, and convertible into the stock of said company, at the option of the holder, at any time within ten years after their date, under an act of the general assembly of the State of Louisiana approved March 15th, 1854, entitled "An act for the subscription by the city of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company," and also in conformity with the provisions of an ordinance of the common council of said city, approved April 7th, 1854, entitled "An ordinance providing for the subscription by the city of New Orleans to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company," and also in

conformity with the provisions of an ordinance of the common council of said city approved April 7th, 1854, entitled "An ordinance providing for the subscription by the city of New Orleans to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company," which ordinance was ratified by the duly qualified voters of the
35 city of New Orleans on the 21st day of April, 1854.

In testimony whereof the mayor and treasurer of the city of New Orleans have signed these presents, and the comptroller of said city has countersigned the same, and the seal of the city is hereunto affixed.

Done at New Orleans this first day of May, in the year of our Lord one thousand eight hundred and fifty-four.

[SEAL.] (Signed) JNO. L. LEWIS, *Mayor.*

(Do.) W. H. GARLAND, *Treasurer.*

(Do.) O. DE BUYS, *Comptroller.*

(Endorsed:) New Orleans, Jackson and Great Northern Railroad Co. Bond of the city of New Orleans. $1,000. No. 744. Redeemable May 1st, 1874. Interest at six per cent. per annum. Payable May 1st and November 1st in the city of New York. Ne varietur. New Orleans, 18th April, 1857. Tho's Layton, not. pub.

36 The New Orleans, Jackson and Great Northern Railroad Company, for value received, hereby transfer the within bond to or bearer.

New Orleans, this day of , 185 .

W. S. CAMPBELL, *President.*

J. CALHOUN, *Secretary.*

AUDITOR'S OFFICE, *New Orleans, May 24th,* 1866.

Retransferred to the bank this day.

H. PERALTA, *Auditor.*

MERCHANTS' BANK, *New Orleans, January 23rd,* 1872.

Released without recourse in any event to—

J. E. JANEAU, *Cashier.*

Be it known that this day, before me, Gustave Le Gardeur, jr., a notary public duly qualified in and for the parish of Orleans, State of Louisiana, personally appeared J. E. Janeau, cashier of the Merchants' Bank, well known to me as such, and to be the person who signed the foregoing release, and acknowledged the same to be his own act and deed. And I, the said notary, do hereby certify that I have seen
37 the minutes of the board of directors of said bank authorizing the sale of the within bond.

Given under my hand and seal at New Orleans this 23rd day of January, A. D., 1872.

[SEAL.] (Signed) G. LE GARDEUR, JR., *Not. Pub.*

[5-cent int. rev. stamp cancelled.]

Bond of the City of New Orleans.—Filed February 28th, 1876.

$1,000.] [$1,000.

CITY OF NEW ORLEANS, STATE OF LOUISIANA.

No. 1441. C.

Know all men by these presents, that the city of New Orleans is indebted to the New Orleans, Opelousas and Great Western Railroad Company, or their assigns, in the sum of one thousand dollars, which sum the said city promises to pay, in lawful money of the United States, at the office of the city treasurer, to the said New Orleans, Opelousas and Great Western Railroad Company, or their assigns, in twenty years from the date hereof, with interest at the rate of six per cent. per annum payable semi-annually on the *the* first day of October and the first day of April in each year, on the delivery of the interest coupons
38 attached, in the city of New York, at such bank as the comptroller of the city of New Orleans shall direct.

This bond is one of a series of fifteen hundred of the same tenor authorized to be issued to the New Orleans, Opelousas and Great Western Railroad Company in payment of the subscription of the city of New Orleans to the capital stock of said company, for one million five hundred thousand dollars, transferable by the endorsement of the president and secretary of said company, and convertible into the stock of said company at the option of the holder at any time within ten years after their date, under an act of the general assembly of the State of Louisiana, approved March 15th, 1854, entitled "An act providing for the subscription by the city of New *of New* Orleans to the stock of the New Orleans, Opelousas and Great Western Railroad Company," and also in conformity with the provisions of an ordinance of the common council of said city approved April 7th, 1854, entitled "An ordinance providing for the subscription by the city of New Orleans to the capital stock of the New Orleans, Opelousas and Great Western Railroad
39 Company," which ordinance was ratified by the duly qualified voters of the city of New Orleans on the 21st day of April, 1854.

In testimony whereof the mayor and treasurer of the city of New Orleans have signed these presents, and the comptroller of said city has countersigned the ; and the seal of the city is hereunto affixed.

Done at New Orleans this first day of April, in the year of our Lord one thousand eight hundred and fifty-five.

[SEAL.] (Signed) JNO. L. LEWIS, *Mayor.*

(Signed) W. H. GARLAND, *Treasurer.*

(Signed) O. DE BUYS, *Comptroller.*

(Endorsed:) New Orleans, Opelousas and Great Western Railroad Company. Bond of the city of New Orleans. $1,000. No. 1441. Redeemable April 1st, 1875. Interest at six per cent per annum. Payable October 1st and April 1st, in the city of New York.

40 The New Orleans, Opelousas and Great Western Railroad Company, for value received, hereby transfers the within bond to or bearer.

New Orleans, this twenty-third day of July, 1855.

(Signed) WILLIAM G. HEWES, *President.*

(Signed) BENJ. F. FLANDERS, *Secretary.*

41 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 40 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of the United States on the relation of Charles Parsons versus the City of New Orleans, No. 7913 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 25th day of July, A. D. 1876.

[SEAL.] F. A. WOOLFLEY,
Clerk.

I, William B. Woods, United States judge for the district of Louisiana, do certify, that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 25th day of July, A. D. 1876.

W. B. WOODS,
Judge.

42 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the United States on the relation of Charles Parsons and Charles I. Leeds, the mayor and the administrators of the city of New Orleans, a manifest error hath happened to the great damage of the said United States of America on the relation of Charles Parsons as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court of the United States, this 10th day of June, in the the year of our Lord one thousand eight hundred and seventy-six.

[SEAL.]

F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) United States circuit court. No. 7913. The United States ex rel. Charles Parsons, plaintiffs in error, versus City of New Orleans, the mayor & administrators thereof, defendants in error. Writ of error filed June 10th, 1876. F. B. Vinot, d'y cl'k.

43 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Charles I. Leeds, the mayor and the administrators of the city of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein the United States of America on the relation of Charles Parsons are plaintiffs in error, and you are defendants in error, to show cause if any there be, why the judgment rendered against the said plaintiffs' in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 10th day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

(Indorsed:) United States circuit court. No. 7913. The United States on the relation of Charles Parsons, plaintiff in error, vs. the City of New Orleans, the mayor & administrators thereof, defendants in error. Citation.

Received June 15, 1876, by the U. S. marshal, and on the same day, month, and year served a copy hereof on the mayor & administrator of the city of New Orleans by handing the same to Charles J. Leeds, the mayor of said city, in person in the city of New Orleans.

S. B. PACKARD,
U. S. Marshal.
By S. W. REED,
D'y Marshal.

On this 20th day of June, 1876, personally appeared before me the subscriber, S. W. Reed, and makes oath that he served a copy of the within citation, as stated in his official return thereon.

S. W. REED,
D'y U. S. Marshal.

Sworn to and subscribed before me, this 20th June, 1876.

F. B. VINOT,
U. S. Comm'r.

44 UNITED STATES OF AMERICA:

Circuit court of the United States in, and for the 5th circuit and district of Louisiana.

THE UNITED STATES ON THE RELATION OF Charles Parsons *vs.* CITY OF NEW ORLEANS. } No. 7913.

Order approving bond.—Extract from the minutes, November term, 1877.

NEW ORLEANS, *Thursday, February 14th*, 1878.

Court met pursuant to adjournment. Present, Hon. E. C. Billings, district judge.

THE UNITED STATES ON THE RELATION OF Charles Parsons *vs.* CITY OF NEW ORLEANS. } No. 7913.

On filing the order of the Supreme Court of the United States in the above entitled cause, of date 30th January, on motion of Tho's Allen Clarke, esq., of counsel of plaintiff in error, it is ordered that the bond filed herein this day be approved by the court, as shown by the signature of the judge thereof upon said bond.

45 *Order of Supreme Court of the U. S. allowing plaintiff in error to file a new bond.—Filed February 14th*, 1878.

Supreme Court of the United States, October term, 1870.

THE UNITED STATES EX REL. CHARLES PARSONS, mayor, &c., plaintiff in error, *vs.* CHARLES I. LEEDS, MAYOR, &C. } No. 429.

On consideration of the motion of Mr. Clarke, of counsel for the plaintiff in error, filed this date, it is ordered that leave be, and the same is hereby granted the plaintiff in error to file a new bond in this cause on or before the first Monday of March next, with good and sufficient surety, conditioned according to law, the bond to be approved by any judge or justice authorized to sign a citation in the case.

30th January, 1878.

True copy.

[SEAL.] Test: D. W. MIDDLETON, *Clerk Sup. Court U. S.*

46 *Bond for writ of error.—Filed February 14th*, 1878.

THE UNITED STATES ON THE RELATION OF Cha's Parsons, plaintiff in error, *vs.* CITY OF NEW ORLEANS, DEFENDANT IN ERROR. } No. 7913.

Know all men by these presents, that we, Charles Parsons, as principal, and James M. Scott, as surety, are held and firmly bound unto the

city of New Orleans, the mayor and administrators thereof, in the full sum of five hundred dollars, to be paid to the said city of New Orleans, and the mayor and administrators thereof, their certain attorney, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this fourteenth day of February, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas, lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein Charles Parsons is relator, plaintiff, and the city of New Orleans defendant, judg-
47 ment was rendered against the said Charles Parsons, relator, and the said Charles Parsons, relator, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said city of New Orleans, the mayor and administrators thereof, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October, 1876:

Now, the condition of the above obligation is such that if the said Charles Parsons shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) THO'S ALLEN CLARK, [SEAL.]
For CHA'S PARSONS.

(Signed) J. M. SCOTT. [SEAL.]

Sealed and delivered in the presence of—
(Signed) F. B. VINOT.

Bond approved Febr'y 14th, 1878.
(Signed) EDWARD C. BILLINGS,
Judge.

DISTRICT OF LOUISIANA, *ss:*

James M. Scott, surety on the within bond, being duly sworn,
48 says that he resides in the city of New Orleans, Louisiana; that he is worth the sum of five hundred dollars over and above his debts and liabilities and property exempt from execution.

(Signed) J. M. SCOTT.

Sworn to & subscribed before me February 14th, 1878.
(Signed) F. B. VINOT,
U. S. Comm'r.

UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing five pages contain true and perfect copies of the order approving bond, order of U. S. Supreme Court allowing pl'ff in error to file new bond, and bond for writ of error in the case of the U. S. on the relation of Cha's Parsons vs. City of New Orleans, No. 7913 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans this 15th day of February, A. D. 1878.

[SEAL.] F. A. WOOLFLFY, *Clerk.*

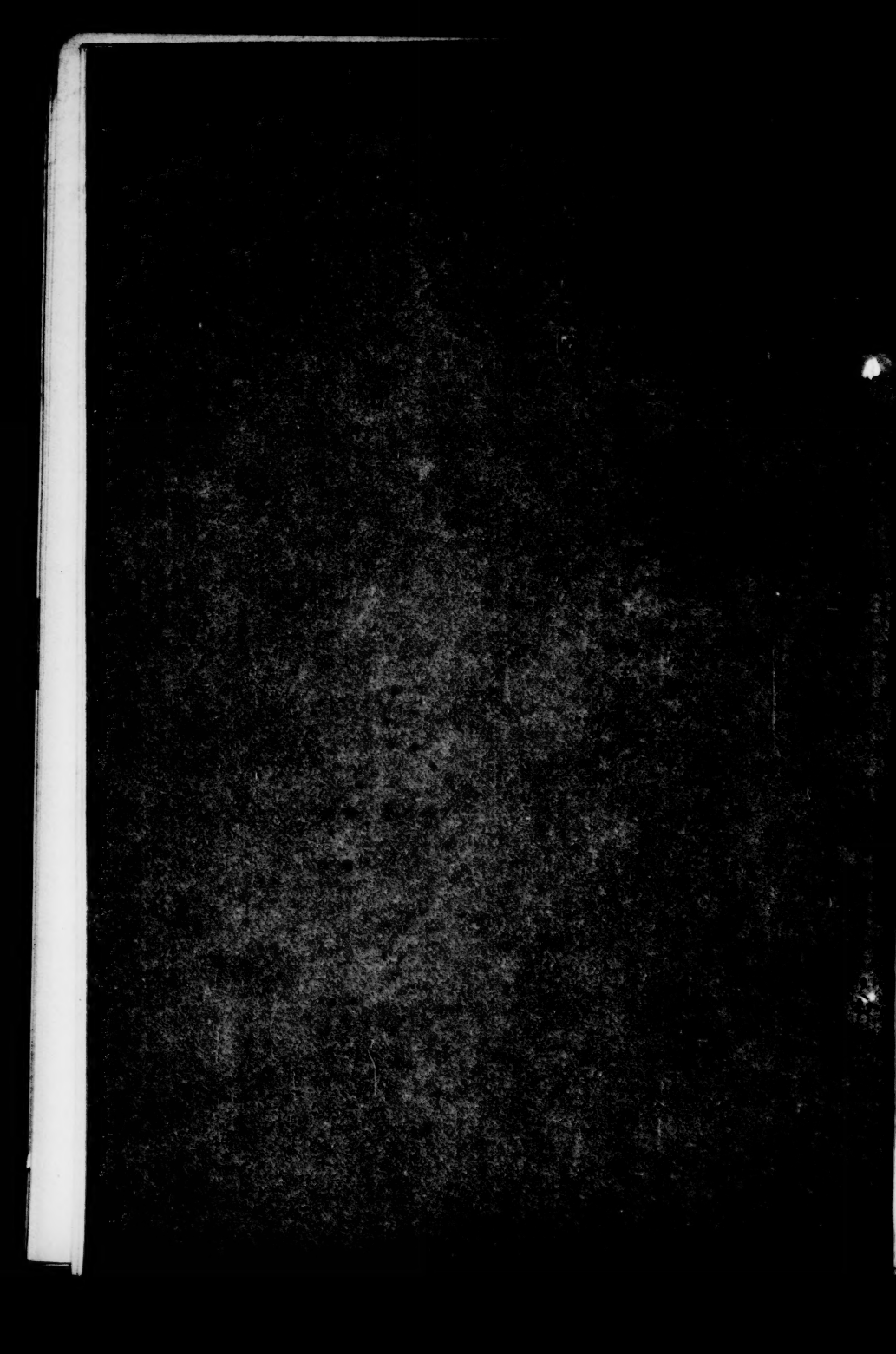
49 I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 15th day of February, A. D. 1878.

EDWARD C. BILLINGS,
Judge.

(Indorsed:) Sup. Court U. S., 1877, Oct. term. No. 129. The U. States ex rel. Charles Parsons pl'ff, error, Charles I. Leeds, mayor, &c. Certified copy of bond & order. Filed 21 February, 1878.

(Indorsement on cover:) No. 157. The United States of America ex rel. Charles Parsons, pl'ff error, vs. Charles I. Leeds, the mayor and the administrators of the city of New Orleans. Louisiana C. C. U. S. Filed 22d September, 1876.



Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 157.

THE UNITED STATES OF AMERICA, *Ex Relatione* CHARLES PARSONS,

Plaintiff in Error,

vs.

THE CITY OF NEW ORLEANS,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

BRIEF FOR PLAINTIFF IN ERROR.

D. H. CHAMBERLAIN,
WM. B. HORNBLOWER,
of CHAMBERLAIN, CARTER & EATON,
Counsel for Plaintiff in Error.

New York:

S. HAMILTON'S SON, PRINTER, 61 Cedar Street, N. Y.

1879.

Supreme Court of the United States

OCTOBER TERM, 1878.
No. 157.

THE UNITED STATES OF AMERICA, *Ex Relatione* CHARLES PARSONS,
Plaintiff in Error,

vs.

THE CITY OF NEW ORLEANS,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA

Brief for Plaintiff in Error.

STATEMENT OF CASE.

The record of this case shows:

(1). That the relator below, the plaintiff in error here, on the 28th day of February, 1876, obtained judgment against the City of New Orleans, in the Circuit Court of the United States for the District of Louisiana, for the sum of seventy-six thousand dollars, with interest at the rate of six per cent., payable semi-annually, on the first days of January and July in each subsequent year, with interest on installments of interest as they accrue, with costs. (Record, fol. 1.)

(2). That this judgment was obtained upon obligations of the City of New Orleans, in the form of matured bonds of said city, issued in payment of certain subscriptions made by the city to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, and the New Orleans, Opelousas and Great Western Railroad Company, to wit: - sixty bonds for one thousand dollars each, issued for the stock of the former company, and sixteen bonds for one thousand dollars each, issued for the stock of the latter company. (Record, fol. 2.)

(3). That a writ of *fieri facias* was duly issued upon this judgment, and returned *nulla bona*. (Record, fol. 2.)

(4). That the respondent below, the defendant in error here, was duly requested to levy and collect taxes sufficient to pay the judgment, and that it failed to perform this duty. (Record, fol. 9.)

The record further shows:

(1). That upon this state of facts, the plaintiff in error filed his petition in the said Circuit Court, for

a mandamus to be directed to the Mayor and Administrators of the City of New Orleans, to compel them to levy a tax sufficient to pay the said judgment. (Record, fols. 1 to 10.)

(2). That the defendant in error, answering said petition, denied the right of the plaintiff in error to a mandamus. (Record, fols. 12 to 15.)

(3). That the plaintiff in error thereupon demurred to the answer of the defendant in error. (Record, fols. 15, 16.)

(4). That the court thereupon gave judgment overruling the demurrer, and denying the petition for a mandamus. (Record, fol. 16.)

To re-examine that judgment, the present writ of error has been taken.

ASSIGNMENT OF ERRORS.

The court below having filed no opinion, or statement of reasons for its judgment, nor any express findings of law or fact, the plaintiff in error assigns for error in said judgment;

1st. That the court below erred in overruling the demurrer of the plaintiff in error and denying a writ of mandamus.

2d That the court below erred in not sustaining the demurrer and granting a writ of mandamus

STATUTORY HISTORY OF THE DEBT FOR THE PAYMENT OF WHICH THE MANDAMUS IS SOUGHT.

(1). The city of New Orleans was originally incorporated by Act of the Legislature of Louisiana, approved February 17, 1805.

2 *Lislet's Gen. Dig. Laws La. p.* 111.

By this Act the city was incorporated under the name of "the Mayor, Aldermen and inhabitants of the City of New Orleans."

The 6th section of the Act provides:—"The said Mayor and City Council (Aldermen) shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleansing, paving and watering the streets of said city; for supporting the city watch, the levee of the river, the prisons, work-houses and other public buildings, and for such other purposes as the police and good goverment of the said city may require."

(2.) In 1836 the original Act of Incorporation with subsequent amendments, was amended by an Act approved March 8, 1836, constituting in effect a new charter.

Acts La., 1836, p. 28.

By the first section of this Act, the city was "divided into three separate sections, each with distinct municipal powers."

By the 4th section it was provided: "Each of said municipalities shall possess separate corporate rights, and are hereby declared to be distinct corporations, and shall possess generally such rights, powers and capacities as are usually incident to municipal corporations, * * * and in general shall possess and exercise within their respective limits all such powers, rights and privileges as are now possessed by the corporation of New Orleans."

(3.) In 1852, the three municipalities created in 1836, together with the City of Lafayette, were consolidated into one municipality, by Acts approved February 23d, 1852.

Acts, La., 1852, Nos. 71 and 72, pp. 43, 55.

Section 1 o the former Act provides: "All that portion of the parish of New Orleans on the left bank of the river Mississippi, shall be the City of New Orleans, and all the free white inhabitants thereof, shall be a body corporate by the name of the "City of New Orleans," and by that name they and their successors shall be known in law, and shall be capable of suing and being sued," &c.

Section 22 provides: "That upon the first organization of the Common Council of the City of New Orleans, as hereinbefore provided, the City of New Orleans, as established by this Act, shall be vested with all the powers, rights, privileges and immunities incident to a municipal corporation, and neces sary for the proper government of the same; and upon the said organization of said council all the powers, rights, privileges and immunities possessed and enjoyed by the first, second and third municipalities of New Orleans, and by the General Council of the City of New Orleans, shall cease and terminate so far as regards the said municipalities and

General Council, and be vested in the City of New Orleans, as established by this Act."

Section 37 provides, that the old city debt (prior to 1836) and the debts of the separate municipalities, shall be assumed by the City of New Orleans, and that bonds shall be issued therefor, to be called the "Consolidated Debt;" and that "from and after the passage of this Act, no obligation or evidence of debt of any description whatever, except those herein authorized, shall be issued by the city of New Orleans or under its authority; nor shall any loan be contracted, unless the same be authorized by a vote of a majority of the qualified voters of said city, which shall be taken in the manner prescribed by the city council after ten days' proclamation by the Mayor, in the newspaper chosen by the City Council; and no ordinance creating a debt or loan shall be valid unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or debt incurred; and such ordinance shall not be repealed until the principal and interest of the capital borrowed or debt incurred are fully paid and discharged."

(4). In 1853 a general Statute of the State was passed, entitled "An Act relative to the duties and powers of Police Juries of this State, and the constituted authorities of incorporated towns and cities," approved April 29, 1853.

Acts La., 1853, *No.* 258, *p.* 234.

Section 1 of this Act provides: "The police juries of the several parishes of this State, and the con-

stituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

Section 2 provides that the ordinance shall remain in force until the debt and interest is paid.

Section 3 provides that if any city or town shall fail to levy the tax provided for in the ordinance, the District Court, on motion of the attorney of any creditor whose claim is in judgment, shall issue its mandate ordering the levy.

(5). In 1852, an Act was was passed entitled "An Act providing for the subscription by the parishes and municipal corporations of this State, to the stock of corporations undertaking works of internal improvement, and for the payment and disposition of stock so subscribed." Approved March 12, 1852.

Acts La., 1852, *No.* 175, *p.* 128.

This act is as follows:

"Sec. 1.—That it shall be lawful for the police juries and municipal corporations of this State, to subscribe to the stock of corporations undertaking works of internal improvement under the laws of this State, on compliance with the provisions of this act.

Sec. 2.—That all ordinances passed for such subscriptions shall contain the following provisions, to wit: 1st. A statement of the number and amount of the shares proposed to be subscribed. 2d. The

levy of a tax on the landed estate situated in the parish or municipal corporation, sufficient to pay the amount of said subscription, and specifying the rate of the taxation, and the period or periods when it shall be payable.

Sec. 3.—That no ordinance passed under the provisions of this act shall be valid or take effect, until it shall have been approved and ratified by a majority of the voters on whose property the tax is proposed to be levied, at an election to be held especially for that purpose, by order of the police jury or municipal corporation passing the ordinance; and said police jury or municipal corporation shall prescribe the manner of holding such election, and shall cause to be furnished to the commissioner of the same, a properly certified list of the authorized voters, and such election shall be preceded by a notice of thirty days, published in one or more newspapers in the parish or municipal corporation where such election shall be held; provided, however, that if such ordinance shall be rejected by a majority of the voters, it shall be lawful at any subsequent period, again to take the sense of the voters in the same manner as at the first election, and at intervals of not less than six months.

Sec. 4.—That if any subscription be made under the terms of this act, the stock so subscribed shall not belong to nor be administered by the parish or municipal corporation by which the subscription shall be made, but said stock shall belong to the taxpayers who shall have paid therefor; and the tax receipt of each taxpayer shall entitle him to a certificate transferable by delivery from the corporation to which such subscription has been made, for an amount equal to the amount of his tax paid;

provided, however, that said police jury or municipal corporation shall be empowered to require such bond and security, and in such sums, from the sheriffs or collectors of said tax, as they may deem necessary."

(6). Under this last act ordinances were passed by the City of New Orleans, May 13th, and May 17th, 1852, subscribing to the stock respectively of the New Orleans, Opelousas and Great Western Railroad Company, and the New Orleans, Jackson and Great Northern Railroad Company.

The terms of the two ordinances, *mutatis mutandis*, are identical. The ordinance subscribing to the stock of the latter company, is as follows:

"*An ordinance* providing for the subscription by the City of New Orleans, to the stock of the New Orleans, Jackson and Great Northern Railroad Company.

1st. That the City of New Orleans subscribe to the stock of the New Orleans, Jackson and Great Northern Railroad Company, shares to the number of eighty thousand, amounting to two millions of dollars, one-sixth of this tax, being one-half of one per cent., shall be payable on the 1st Monday of May, 1853, and another sixth on the first Monday of May, of every subsequent year, until the amount of the subscription is obtained.

2nd. That a tax of three per cent. is hereby levied on all the landed estate situated in the City of New Orleans, said tax being sufficient to pay the amount of said subscription. One-sixth of this tax being one-half per cent., shall be payable on the first Monday of May, 1853; another sixth on the first

Monday of May, 1854; another sixth on the first Monday of May, 1855; another sixth on the first Monday of May, 1856; another sixth on the first Monday of May, 1857; and the remaining sixth on the first Monday of May, 1858.

Said taxes shall be payable at the office of the City Treasurer, and shall be collected in the same manner as all other city taxes, according to the provisions of the 35th section of the law consolidating the City of New Orleans.

3rd. Separate receipts for the tax shall be given to the tax-payers, which shall entitle them to an equivalent amount in stock of the railroad company, and whenever the amount of the tax receipts shall not correspond exactly with the amount of a share or any number of shares in the railroad company, it shall be lawful for the holder of the receipt to complete the fraction, to an amount equivalent to a share, by payment in cash of the deficiency.

4th. It shall be the duty of the City Treasurer to pay over to said railroad company, through its proper officers, on every Monday, the amount of the railroad tax aforesaid, collected during the next preceding week, accompanied by a list of the names of the persons who have paid the tax, and of the amount paid by each.

5th. This ordinance shall not take effect, nor shall an election be held for the purpose of submitting it to the approval of the tax-payers, as required by law, until the Board of Directors of said railroad company shall have communicated in writing, to the Common Council, their consent to accept the subscription herein ordained, payable in the manner herein-above set forth.

Whereas—It has been satisfactorily ascertained that without the aid of the property-holders, the New Orleans, Jackson and Great Northern Railroad cannot be constructed to a successful issue; that the real estate interest receives the paramount advantage caused by such public works, and consequently such interests ought to aid this important undertaking; and although some large property-holders have made handsome subscriptions, yet the great bulk of subscribers to the above-named road are men of limited means and mechanics, the bone and sinew of the community; and

Whereas—Although the majority of real estate owners have not made voluntery subscriptions on the books of the company, yet they are almost unanimous in the belief that a tax must be levied, and many are anxious to pay it, confident in the belief that the tax will not only advance property, but that they will receive for the tax paid a dividend-paying stock that will not be surpassed in the world. Therefore be it

Resolved—That the Mayor is hereby authorized, and directed to order an election in conformity to the above ordinance, to take place on the third Monday in June next, and to make complete returns of said election within ten days from the opening or closing of the polls."

(7). Under these circumstances the city levied taxes for the years 1852 and 1853, for one-sixth part, each year, of the amount subscribed to the stock of each company.

But the burden of the tax upon the people being great, and the companies being embarrassed by the delay in receiving the proceeds, the Legislature in

1854 passed two Acts by which the city was authorized to subscribe to the stock of the two above-named companies, and to make the subscription immediately payable in bonds of the city, for one thousand dollars each, having twenty years to run, &c., and requiring the repeal of the ordinances of May, 1852, authorizing the former subscriptions.

The terms of the two last-named Acts, *mutatis mutandis*, are identical.

Acts La., 1854, *Nos.* 108, 109, *pp.* 69, 72.

The Act authorizing the subscription to the stock of the New Orleans, Jackson and Great Northern Railroad Company, is as follows :

"*Section* 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, that it shall be lawful for the Common Council of the City of New Orleans to subscribe to the stock of the New Orleans, Jackson and Great Northern Railroad Company, in a sum not exceeding two millions of dollars.

Section 2. Be it further enacted, &c., that any ordinance authorizing such subscription shall contain the following provisions, to wit :

1st. A statement of the number and amount of shares for which the city subscribes.

2nd. That the subscription of the city shall be made by the Mayor, and shall be payable in bonds of said city for one thousand dollars each, having twenty years to run, bearing interest at the rate of six per cent. per annum, with interest coupons at-

tached, payable semi-annually in New Orleans or New York, as the company entitled to receive them may prefer, transferable by the endorsement of the president and secretary of said company, and convertible into the stock of said company, at the option of the holders, at any time within ten years after their date.

3rd. That a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds, specifying the rates of said tax, which shall be collected at the same time and in the same manner as the consolidated loan tax of said city; and all ordinances, resolutions or other acts passed by said council, after the first day of January in each year, except an ordinance to impose said consolidated loan tax, and an ordinance to impose a tax for the payment of interest on bonds which may be hereafter issued for subscription to the New Orleans, Opelousas and Great Western Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on said bonds issued to the railroad company herein named shall have been previously passed; provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said company held by the city, as hereinafter provided, which dividends shall be applied by the city to the payment of the interest. And provided, further, that whenever the dividends on said railroad stock of the city shal amount to more than six per cent. per annum, the excess, after the payment of interest, shall be applied to the purchase of the city bonds issued under the provisions of this Act; it being understood that when dividends for less than six per cent. per annum are received on the railroad stock of the city, a

tax for interest shall be levied for the difference only between the amount of said annual dividends and the amount of the annual interest.

4th. That immediately after the passage of the ordinance authorizing the subscription, and its approval by the voters of the city, as hereinafter provided, the Mayor shall cause bonds to be issued to said railroad company for a percentage of the city subscription equal to the percentage which may have been previously called by the Board of Directors of said railroad company on the subscription of private stockholders in the City of New Orleans; and thereafter he shall cause bonds to be issued to said company for the same percentage that may be demanded from private stockholders under any subsequent call of said board.

5th. A repeal of an ordinance of the Common Council of New Orleans, approved May 17th, one thousand eight hundred and fifty-two, entitled "An Ordinance providing for the subscription by the City of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company," provided the repeal of said ordinace shall not be so construed as to relieve the city from the liability to collect and pay over to said railroad company that portion of the railroad tax imposed under said ordinance for the year eighteen hundred and fifty-three, which has not yet been collected and paid over to said company.

Section 3. Be it further enacted, &c., that the city bonds issued to said railroad company shall be received by it at par value, and said railroad company shall issue to the City of New Orleans therefor certificates of stock for an amount equal to the

amount of the bonds received, and the stock of the said company thus issued to the City of New Orleans shall remain forever pledged for the redemption of said bonds; provided, however, that any holder of said bonds who may desire to convert them into the capital stock of the company to which they may have been issued shall, on application to the treasurer of said city, and on surrender to him of the bonds to be converted, receive from said treasurer a transfer of the stock represented by the bonds surrendered, and said bonds shall be immediately cancelled.

Section 4. Be it further enacted, &c., that no ordinance passed by the Common Council, in conformity with this Act, shall be valid or take effect until it shall have been approved and ratified at an election to be held for that purpose by order of the Common Council, by a majority of the voters of the city, who have the right, under existing laws, of voting at city elections. Said elections shall take place within fifteen days after the passage of the ordinance, be preceded by a public notice of ten days, to be published by the Mayor in two or more of the city newspapers, and shall, in all respects, when not herein otherwise provided, be conducted in the manner prescribed by law for city elections; provided, that if the Common Council refuse to subscribe to the stock of the railroad company herein named, in the manner set forth in this act, it shall be lawful at any subsequent period, and as often as the council may deem proper, at intervals of not less than two months, for said council to reconsider the question; and should the ordinance, when finally passed by the council, be rejected by a vote of the majority of the duly qualified voters of the city when first presented to them for ratification, the council may, at any subsequent period, and as often

as they may deem proper, cause the sense of the voters again to be taken, in the same manner as at the first election, at intervals of not less than two months.

Section 5. Be it further enacted, &c., that no ordinance passed by the Common Council, in conformity with this Act, shall be submitted for ratification to the voters who have the right by law to vote at city elections, until the Board of Directors of said railroad company shall have notified the Mayor in writing of their consent to accept said ordinance; provided, their acceptance of the ordinance, before it shall have been submitted to the voters of the city, shall be null and void, in the event of the rejection of the ordinance by said voters.

Section 6. Be it further enacted, &c., that any bonds which may have been issued by said railroad company, and secured by a pledge of the railroad tax for the year one thousand eight hundred and fifty-four; one thousand eight hundred and fifty-five; one thousand eight hundred and fifty-six; one thousand eight hundred and fifty-seven; one thousand eight hundred and fifty-eight, levied under the ordinance of the council referred to in the second section of this Act, and approved May seventeenth, one thousand eight hundred and fifty-two, shall be cancelled by the company which issued the same, before said company shall receive from the city any of the bonds authorized to be delivered for subscription to the stock of said company, by virtue of this Act; or if said company prefer, they shall have the right to deposit in the Louisiana State Bank, an amount in cash sufficient to pay said bonds, so secured by a pledge of the railroad tax, and the interest on said bonds until their maturity; and on the exhibition to the Mayor of the railroad

tax bonds cancelled by the company, and a certificate from the cashier of said bank, showing the amount of cash specially deposited for the redemption of the railroad tax bonds not cancelled, and the interest thereon, until maturity; the Mayor shall, if satisfied that the whole of the bonds of the company, secured by a pledge of the railroad tax, have been cancelled or provided for by a deposit in the manner herein directed, deliver the city bonds to which said company may be entitled on account of the subscription of the city.

Section 7. Be it further enacted, &c., that the Common Council shall in the month of May of each year, elect by joint ballot, three citizens of New Orleans as directors of the New Orleans, Jackson and Great Northern Railroad Company, who shall serve as such for one year, or until their successors shall be elected; provided no member of either board of the Common Council, or officer of the corporation, shall be eligible as a director; and provided, further, that on the conversion into stock of one-third of the bonds issued to said company by the city, the Common Council shall elect but two directors in said company; when two-thirds of said bonds shall have been converted, the council shall elect but one director; and when the whole of said bonds shall have been converted, the council shall no longer elect any directors.

Section 8. Be it further enacted, &c., that this Act shall take effect and be in force from and after its passage."

(8.) Under the two Acts last referred to, the city passed two ordinances subscribing to the stock of the afore-mentioned companies.

Rev. City Laws and Ord. of N. O., pp. 408, 411.
(Comp. of Leovy and Luzenberg).

The ordinance authorizing the subscription to the stock of the New Orleans, Jackson and Great Northern Railroad Company, is as follows:

"*An ordinance* providing for the subscription, by the City of New Orleans, to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company.

Art. 908. (1). Be it ordained, that the Mayor subscribe, on behalf of said city, forty-eight thousand shares, of twenty-five dollars each, of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, amounting to two millions of dollars.

Art. 909. (2). That said subscription shall be payable in bonds of the City of New Orleans, for one thousand dollars each, having twenty years to run, bearing interest at the rate of six per cent. per annum, with interest coupons attached, payable semi-annually in New Orleans or New York, as said railway company may prefer, transferable by the endorsement of the president and secretary of said company, and convertible into the stocks of the said company, at the option of the holder, at any time within ten years after their date.

Art. 910. (3). That a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds,

specifying the rate of said tax, which shall be collected at the same time, and in the same manner as the consolidated loan tax of said city; and all ordinances, resolutions, or other acts passed by the council after the first day of January in each year, except an ordinance to impose said consolidated loan tax, and an ordinance to impose a law for the payment of interest on bonds which may hereafter be issued for subscription to the New Orleans, Opelousas and Great Western Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on the bonds issued to the New Orleans, Jackson and Great Northern Railroad Company shall have been previously passed. Provided, that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said company, held by the city, which dividends shall be applied by the city to the payment of the interest. And provided further, that whenever the dividends of said railroad stock of the city shall amount to more than six per cent. per annum, the excess, after the payment of interest, shall be applied to the purchase of city bonds issued under the provisions of this ordinance; it being understood that when dividends for less than six per cent. per annum are received on the railroad stock of the city, a tax for interest shall be levied for the difference only between the amount of the said annual dividends and the amount of the annual interest.

Art. 911. (4). That immediately after the passage of this ordinance, and its approval by the voters of the city, as hereinafter provided, the Mayor shall cause bonds to be issued to said railroad company for a percentage of the city subscription, equal to the percentage which may have been previously

called by the board of directors of said railroad company, on the subscriptions of private stockholders in the city of New Orleans; and, thereafter, he shall cause bonds to be issued to said company for the same percentage that may be demanded from private stockholders, under any subsequent call of said board.

Art. 912. (5). That an ordinance, approved May 17th, 1852, entitled "An ordinance providing for the subscription by the City of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company," be, and the same is hereby repealed, provided the repeal of said ordinance shall not be so construed as to relieve the city from the liability to collect and pay over to said railroad company that portion of the railroad tax imposed under said ordinance, payable in the year one thousand eight hundred and fifty-three, which has not yet been collected and paid over to said company.

Art. 913. (6). That within fifteen days after the passage of this ordinance, and after ten days notice in two or more of the city newspapers, to be given by the Mayor, and on a day within the said fifteen days to be specified in said notice by said Mayor, an election shall be held for the approval and ratification or rejection of this ordinance by the voters of the City of New Orleans, who have the right, under existing laws, of voting at city elections, said elections to be conducted in the manner prescribed by law for city elections. At said election the voters who may be in favor of approving and ratifying this ordinance, shall write or print on their ballots the words "For the ordinance," and those who are opposed to said ordinance, shall write or print on their ballots the words "Against the ordinance."

Provided, the board of directors of said company shall notify the Mayor in writing, before the publication of the notice of election, of their consent to accept said ordinance, and provided further, that the provisions of this ordinance for a subscription to the stock of the said New Orleans, Jackson and Great Northern Railroad Company, shall not be valid until this ordinance shall be ratified by a majority of the voters cast at the election herein ordered."

(9.) Under the ordinances last mentioned, the bonds therein authorized were issued, in conformity with the provisions thereof, at various dates in 1854 and 1855, to the said companies, the bonds being transferable by endorsement of the companies' officers, and being so endorsed, the bonds now in question were duly transferred to the plaintiff in error.

(10). By an Act entitled "An Act, supplemental to an Act to establish a general system of free banking in the State of Louisiana," the Auditor of the State was authorized to receive, as security for the circulation of banks organized under this Act, bonds issued under the Act authorizing the subscription to the stock of the railroad companies, Nos. 108 and 109.

Acts La., 1854. *No.* 216, *p.* 151.

(11). By Section 12, of a later Act, entitled "An Act to establish a general system of Free Banking in the State of Louisiana," approved March 15, 1855, all banks and banking companies organized under this Act, were authorized to deposit with the Auditor of the State as security, among others, for their circulating notes, "bonds which may be issued by the City of New Orleans under the provisions of

an "Act, to authorize the City of New Orleans, to subscribe to the stock of the New Orleans, Jackson and Great Northern Railway Company," approved March 15, 1854; or the bonds which may be issued by said city under the provisions of an "Act to authorize the City of New Orleans, to subscribe to the stock of the New Orleans, Opelousas and Great Western Railway Company," approved March 15, 1854."

Acts La. 1855. *No.* 166, *p.* 217.

(12). The constitutionality of the legislation referred to, in 1852 and 1854, authorizing these subscriptions, was considered and affirmed by the Supreme Court of Louisiana, in the cases of *Police Jury v. McDonough*, 8 Ann. R. 341; *New Orleans v. Grailhe*, 9 Ann. R. 573; and *New Orleans v. Romes*, 9 Ann. R. 573.

ARGUMENT.

All question or inquiry concerning the validity of the bonds now in question, is concluded by the judgment into which the bonds have been merged.

Supervisors v. United States, 4 Wall. 435.
Riggs v. Johnson County, 6 Wall. 166.
The Mayor v. Lord, 9 Wall. 409.

The answer of the defendant in error, in the Court below, sets up two grounds of defense to the petition for a mandamus;

1st. That the laws of Louisiana have not directed a tax to be levied or collected to pay the principal of the bonds, and hence the city is without authority to levy the tax demanded.

2d. That the stock held by the city in the said companies being forever pledged for the redemption of the bonds, the plaintiff in error must resort to the stock for payment before he can demand payment from any other fund.

The demurrer raises the question of the legal sufficiency of these defenses.

I.

It is admitted that the laws of Louisiana, and the ordinances of New Orleans, contain no *express* direction for the levy of a tax to pay the principal of the bonds in question.

It becomes necessary therefore to inquire, in the first place, what are the principles governing the granting of the writ of mandamus to compel the levy of a tax to pay municipal obligations, in the absence of any express requirement or authority for the levy of such a tax?

(1.) It is firmly established by the decisions of this Court, that whenever a municipality is expressly authorized to levy a tax for the payment of its obligations, the Courts of the United States will, by mandamus, compel the levy of such tax to satisfy a judgment recovered upon such obligations, where execution has been issued and returned unsatisfied.

Knox Co. v. Aspinwall, 24 How. 376.
Von Hoffman v. Quincy, 4 Wall., 535.
Benbow v. Iowa City, 7 Wall., 313.
Supervisors v. Rogers, 7 Wall., 175.
Supervisors v. Durant, 9 Wall., 415.
County of Cass v. Johnston, 95 U. S., 360.

(Citing as authority, *Jordan v. Cass Co.*, 3 Dill., 185.)

U. S. v. County of Clark, 95 U. S., 769.

U. S. v. County of Clark, 96 U. S., 211.

(2.) General authority, or even permission, to levy a tax, will be held to impose the duty of levying it whenever the levy is necessary to pay the debts of the municipality.

Supervisors v. United States, 4 Wall., 435.

Galena v. Almy, 5 Wall., 705.

In the former case, it was provided that the Boards of Supervisors, in counties where the current revenue was not sufficient to pay the debts, "may, if deemed advisable, levy a special tax," &c. This Court held that this language must be regarded as peremptory and warranting a mandamus, when public interest or individual rights require it.

In *Galena v. Almy*, the city charter provided that the city council "may, if it believe that the public good and the best interests of the city require it," levy a tax to pay its funded debt. This Court held that a mandamus will be warranted at the suit of a judgment creditor, to compel the levy.

In this case the Court says: "What public officers are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

(3.) If the statute authorizing or creating the debt is silent as to the means of payment, it will be inferred that it is to be paid by taxation, and power to tax will be held to be, *ipso facto*, conferred, unless there is a limitation fixed to the power to tax, which forbids such inference.

Loan Association v. Topeka, 20 Wall., 655.
Lowell v. Boston, 111 *Mass.*, 460.
Commonwealth v. Commissioners, 37 Penn. St., 277.
Same v. Same 40 Penn. St. 348.
Same v. Same, 43 Penn. St., 403.
Coy v. City Council of Lyons City, 17 Iowa, 1.
Madison County Court v. Alexander, 1 Walker (Miss.) 523.
Gibbons v. Mob. and Gt. No. R. R. Co., 36 Ala., 439.
Ex parte Selma and Gulf R. R. Co., 45 Ala., 730.
City of Chicago v. Hasley, 25 Ills., 595.
Hasbrouck v. Milwaukee, 25 Wis., 122.
Ex parte Parsons, 1 Hughes, 282.

In *Loan Association v. Topeka*, 20 Wall, 655, an Act of the Legislature of Kansas undertook to confer power on the City Council of Topeka, to encourage private manufactories, either by direct appropriation of money or by issuing bonds. Bonds having been issued under the Act, suit was brought to recover judgment on the matured coupons. The city having demurred to the declaration, the question was presented, whether the bonds were valid. No provision being made in the act for the payment of the principal or interest of the bonds,

this Court held: *First*, that in the absence of a provision for payment, it must be inferred that taxation alone could be resorted to; and, *second*, the the State having no authority to authorize taxation to aid private enterprises, there were no means of payment, and hence the bonds are properly declared void.

In discussing the first point, the Court says:

"The proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payment from some other source, imply an obligation to pay by taxation. * * * It is to be inferred that when the Legislature of the State authorizes a county or city to contract a debt by bond, *it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the Act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.*"

In *Lowell v. Boston*, 111 Mass., 460, the Supreme Court of Massachusetts, speaking of bonds authorized by an Act of the Legislature, to be issued by the City of Boston to raise a fund to be used, by way of loans to individuals, in rebuilding upon that portion of the city burnt over by the great fire, says:

"The right to incur the obligation implies the right to raise money by taxation for payment of the bonds; or, what is equivalent, the right to levy a tax for the purposes for which the fund is to be raised by means of the bonds so authorized."

Finding the power to levy taxes for such objects forbidden by the constitution, the Court declared the Act authorizing the issue unconstitutional.

In *Commonwealth v. Commissioners*, 37 Penn. St. 277, the County of Allegheny had been author-

ized by an Act of the Legislature to subscribe to the stock of a railroad company, and to issue its bonds in payment therefor. The interest being unpaid upon one of these bonds, a writ of mandamus was applied for to compel the Commissioners of Allegheny County to levy taxes sufficient to pay said interest. The return of the commissioners set up, among other defences, that the acts authorizing the subscription and issue provided no means or of payment, mode either of the interest or principal of the bonds.

Upon this defence the Supreme Court says: "The Act of 1843 authorized subscriptions by certain counties to be made 'as fully as any individual could do' without prescribing more precisely the terms. But by the 5th section counties subscribing are authorized to borrow money to pay for such subscription. We have decided that bonds or certificates of loan issued by a municipal corporation are an ordinary and appropriate mode of borrowing money, and the Act of 1853 expressly authorized the issue of such securities. The subscriptions were accordingly made and the bonds issued. There was a lawful debt incurred by the County, and as no other than the ordinary mode of extinguishing it, or of paying the interest thereon, was provided, it follows, of course, that the ordinary mode of raising the means must be resorted to, namely, to provide for it in the annual assessment of taxes for County purposes. This portion of the return is insufficient."

Again, in the same case the Court says:

"In the next place it is averred that there is no authority to levy a tax for the payment of the interest by the County. We have already treated of this, and said that the authorty to create the debt implies an obligation to pay it; and when no special mode of doing so is provided, it is also implied that

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it is to be done in the ordinary way,—by the levy and collection of taxes."

In Commonwealth v. Commissioners, 40 Penn. St. 348, and in *Commonwealth v. Commissioners* 43 Penn. St. 403, the decision in 37 Penn. St. 277, is specially and emphatically affirmed.

In *Hasbrouck v. Milwaukee*, 25 Wis., 122, this principle is thus forcibly and broadly stated by Dixon, C. J.:

"The raising of money by taxation being the usual, and I may say the only, means by which the payment of such debts can be made or enforced, the power to tax in the ordinary methods, if not expressly given, would, as it seems to me, be most clearly and necessarily implied from the power to contract the debt itself, and would run with the debt, creating a continuous and irrepealable obligation and duty to exercise it so long as the debt or any part of it remained unpaid."

In *Ex parte Parsons*, 1 Hughes, 282, the relator recovered a judgment against the city of Charleston upon certain over-due certificates of stock of the city, issued under the general powers of the city charter; but without any special requirement or undertaking either in the charter, ordinance, or certificate, for the levy of a tax to provide the means of payment. Execution upon the judgment was returned unsatisfied; payment was demanded from the city and refused; and the city council was requested to levy a tax to be applied to the payment of the judgment, which was refused. Application was, thereupon, made to the United States Circuit Court for a writ of mandamus.

The defence was, in substance, that it was not the duty of the city to levy a tax, because no special provision for such a tax was embraced in the con-

tract and there was no power in the city to levy such a tax.

The Court (Waite, C. J., and Bond, Ct. J.,) found (1) that there was no legislative limit upon the amount of money that may be raised by taxation by the city, power being conferred by the constitution of the State upon "the corporate authorities * * * of cities * * * to assess and collect taxes for corporate purposes," and (2) that payment could only be made by the exercise of the power of taxation by the city.

The Court, after examining the cases, especially in this Court, says: "The authority to contract a debt carries with it the power to provide the means of payment by taxation, if necessary. If the power to make the contract is accompanied by a provision for special taxation to meet its obligations when made, such taxation may, under some circumstances, exclude all other. But in the absence of any such restrictive provision, the general power of corporate taxation may, as a rule, be invoked.

In the present case there is no restriction. The obligation to pay exists, and the power to tax for its discharge is included in the general power to tax for all corporate purposes. * * * Here, as we have seen, the relator has the right to require the levy and collection of a tax to provide the means for the payment of his judgment, and it is the duty of the city to do what he requires. Unless it is done, he is without remedy for the collection of his debt Therefore, a writ may lawfully issue to enforce the right by requiring the performance of the duty."

(4). The inference that municipal obligations are to be paid by taxation, may undoubtedly be repelled

by the provision, in the statute, of other adequate means of payment.

Loan Association v. Topeka, 20 Wall. 655.

Ex parte Parsons, 1 Hughes, 282.

United States v. Co. of Clark, 96 U. S., 211.

In *United States v. County of Clark*, (*supra*) this Court held that the requirement or authority to levy a special tax for the payment of bonds of a county, the proceeds of such special tax being wholly inadequate to the payment of the obligations incurred, cannot be construed as a limitation upon the power of taxation for that purpose, but that the inference remains that the obligations, so far as they are not paid by the proceeds of the special tax, are to be paid out of the general county taxes.

(5). It sems a plain and necessary deduction from the reasoning and conclusions of the authorities already cited, that where the statutes or other evidences of legislative intention, leave that intention fairly in doubt, and especially where no other adequate means of payment are provided, the Courts will resolve the doubt in favor of the right to tax, and for the protection of *bona fide* creditors.

See *County of Ray vs. Vansycle*, 96 U. S., 687.

The principles now stated are believed to be suitable and adequate for the correct determination of the issues involved in the present case.

II.

It being conceded that there is no express authority in the statutes of Louisiana for the levy of any special tax, for the payment of the bonds in question, two inquiries arise;

First.—Do the statutes under which the bonds were issued, provide any other adequate means of payment, or indicate, expressly or by implication, that they are to be paid otherwise than by taxation?

Second.—Is there any restriction upon the power of the city of New Orleans to tax for the payment of these bonds?

First.—The only claim of any provision for the payment of the bonds, otherwise than by taxation, is set up in the answer of the city, (Record, fol. 14.) where it is alleged that "the stock held by the city in the said railroad Companies was pledged for ever, for the redemption of the said bonds, * * * and respondents say that relator must first resort to said stock for payment of his said bonds before he can demand payment from any other funds."

In the case of the *United States ex rel. Ranger* v. *City of New Orleans*, a case now pending on writ of error in this Court, No. 150, and involving the same question we are now discussing,—reported in 2 Woods 230,—Judge Billings gives at length his reasons for denying the writ of mandamus.

One chief ground stated by Judge Billings is, that any inference that taxation was to be resorted to for payment of the bonds, is repelled by the provision of the Act authorizing the subscription; that

"the stock of the said Company, thus issued to the city of New Orleans, shall remain forever pledged for the redemption of said bonds." He says:

"It is urged by the counsel for the city that the statute by which these bonds were authorized shows that the Legislature intended that the principal should be paid by means other than taxation. An examination of this statute has convinced me that the belief of the Legislature was that the principal sum could, and its intent was that the principal sum should, be paid out of the stocks and its revenues. The act pledges in perpetuity the stock for that purpose; it provides that all dividends derived from the stock above six per cent. should be devoted to extinguish the principal, and while providing with extreme rigor for the payment of the interest, in case dividends from the stock should not be altogether sufficient, and, while providing that until the ordinance levying the yearly tax to pay the interest had been passed by the common council, no valid resolution could be adopted, it is profoundly silent as to any tax to pay the principal. The implication is that the legislature intended the bondholder should, for the collection of the principal sum, look to the stock, at least to the exclusion of taxation."

It will be seen that Judge Billings claims more for the pledge of the stock than is claimed by the city in its answer,—the city only insisting that the "relator must *first* resort to said stock for payment before he can demand payment from any other fund," while Judge Billings insists that he can resort *only* to the stock.

It is also alleged in the petition and not denied in the answer, that the stock is entirely worthless. It is certain, therefore, that a resort to the stock, if it could be had, would be quite fruitless.

The question thus presented is,—Is the pledge of this stock such a provision for the payment of the bonds as will be held to exclude all other means of payment?

The Act of 1854, as has been seen, provided in its third section, that the railroad company should issue to the city certificates of stock for an amount equal to the amount of the bonds issued to the company, and that "the stock of the said company, thus issued to the city of New Orleans, shall remain for ever pledged for the redemption of said bonds."

Looking to the language here used, it is at least difficult to see how it can be construed as a provision for the absolute payment of the bonds, such as to exclude the city from all power or right to pay the bonds in any other way. On the contrary, the language used seems plainly intended to create a statutory pledge, by way of collateral security, for the payment of the bonds. Exploring the words employed to express the intention of the Legislature, there is no difficulty in concluding that the intention was to give to the bondholders the additional security of a pledge of the stock; not, indeed, a common law or strict pledge, because here the thing pledged remains in the hands of the debtor, but a *statutory* pledge, whereby the stock, though remaining in the hands of the city, becomes impressed with the incidents and subject to the burdens and liabilities of an ordinary "pledge." Such is the clear import of the words of the statute.

Unless, therefore, the words of the statute taken in their ordinary sense, fail to express correctly the intention of the Legislature, the stock in question must be held to be "pledged," and nothing more, for the payment of the bonds.

But the legal characteristics of a "pledge" forbid the construction put upon the statute by Judge Billings.

"A pledge is limited to cases where a thing is given as a mere security for a debt."

Story on Bailm, § 286.

Domat's definition is, that "a pledge is an appropriation of the thing given for the security of an engagement."

1 *Domat*, B., 3 tit., 1, § 1, art. 1.

The Code of Louisiana of 1825, Art. 3100, defines it thus: "The pledge is a contract, by which one debtor gives something to his creditor, as a security for his debt."

The pledge created by this statute would seem to answer to an hypothecation, in the strict sense of the Roman law; that is, a pledge without possession by the pledgee.

Story on Bailm, § 288.

The existence of the pledge does not suspend the right of the pledgee to proceed personally against his debtor for his whole debt without recourse to the pledge, because it is only a collateral security.

Story on Bailm, § 315.
2 *Kent. Comm.*, 582.
South Sea Company vs. Duncomb, Str., 919.
Elder vs. Rouse, 15 Wend., 219.
Beckwith vs. Sibley, 11 Pick., 481.

In the present case it is shown (Record, folios 33, 40), that by each of its bonds the city of New Orleans proclaimed itself indebted to the railroad company, or its assigns, in the sum of one thousand dollars, which sum the said city promises to pay.

Such instruments create an absolute personal liability on the part of the obligor to pay the sum

named. The giving of a pledge or collateral security by the obligor, or, as in the present case, the creation of a pledge or collateral security by statute, does not affect the personal liability of the obligor, or operate as payment, except so far as the pledge may be actually sold and applied to the payment of the debt.

There is no duty imposed upon the pledgee to have recourse first to the pledge.

Nothing is better settled than that a secured creditor can proceed directly against his debtor without exhausting or having recourse at all to his security.

If, therefore, the language of the statute correctly states the purpose of the Legislature, the pledge of the stock was merely security collateral to the primary and direct liability of the city, and was, in no sense, payment or exclusive means of payment. The bond-holder was not thereby compelled to look to this security, either in the first instance, as the answer of the city claims, or exclusively, as Judge Billings holds, or even at all, except at his own option, before or after exhausting his remedies directly against the city.

But, if regard be had in seeking the intention of the Legislature, to other considerations than the words of the statute, it will become plainer still that the intention imputed to the Legislature by Judge Billings is inadmissible.

The sole object of issuing the bonds of the city in payment of the stock, was to aid the companies in raising funds to build their roads. If the stock had been available to the company, they would have needed no aid, but would have sold their stock directly. Is the suggestion now to be entertained, that the public who would not buy the stock, would buy the bonds, if their only means of payment was the revenues and proceeds of the same stock?

It is impossible with reason to impute such folly either to the Legislature or to the bond-holders. Neither party could have intended such a scheme.

It is incredible too, that the legislature could have supposed they were providing adequate means of payment for the bonds, or that the bond-holders should have paid their money upon such a supposition, when it directed that the stock of the companies should be held in pledge for the redemption of the bonds. Railroad stocks are of notoriously fluctuating and uncertain value. They do not represent any tangible property or absolute rights of property; but only the right to share in p ospective and contingent profits or dividends which may or may not be realized, and in a majority of cases are not realized. To ask the holders of these city bonds to look to the stock exclusively for payment, would have been trifling with them.

The fact also, alleged in the petition and not denied in the answer, that the stock in the New Orleans, Jackson and Great Northern Railroad Company, has been sold by the City, and, as appears by Judge Billings' opinion, that the proceeds of such sale "have long since been used and expended," would seem to be a very plain indication that the city, at the time of such sale, regarded itself at full liberty to sell the stock and appropriate its proceeds before the maturity of the bonds, notwithstanding it was pledged for ever for their redemption—a claim totally at variance with the idea that the stock was the sole means of payment of the bonds.

Upon this branch of the argument the case of *United States vs. Clark County*, (*supra*), has a most important and direct application. In that case bonds of the county had been issued in payment of a railroad subscription, the Act authorizing the sub-

scription providing for the levy of a tax not exceeding one-twentieth of one per cent. on the assessed value of taxable property for their payment. The relator having obtained a judgment for unpaid instalments of interest on the bonds, applied for a mandamus to compel payment of the balance of his judgment out of the general county taxes. The defence was that the special tax of one-twentieth of one per cent. was exclusive of all other means of payment.

The Court says:

"The question presented by the record is, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it. And we think that he is so entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. * * * * * *

A limitation was prescribed for the special tax which was allowed to be levied. But that was a special tax distinct from and in addition to the ordinary tax which, by other statutes, the County Court was authorized to levy; probably supposed to be made necessary by the new liabilities the county might assume. There is no provision in the Act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed and none, we think, can be fairly implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the States, and more than once by the Federal Government. * * * Limitations upon a special fund provided to aid in the payment of a debt are in no sense restrictions of the liability of the debtor. Why, then, must not the special tax of one-twentieth of one per cent. be regarded as merely an addition-

al provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? * * * And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the Legislature authorized the county to incur the debt, it intended to deny the creditor the right to look to the treasury of the county for payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor relieved from attendant liabilities. And it is not to be inferred, from a provision giving a creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made. And that, too, in the absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute. Such is not a fair implication of it's purpose. It accords neither with its letter nor its spirit. Yet, it is for such an implication the defendants contend, and upon it their case wholly rests."

And again the Court says:

"In the absence of any express declaration that the creditor's right to claim payment shall not reach beyond the fund provided from the small special tax, we cannot think the Legislature proposed rendering the bonds unsalable or almost worthless in the hands of those who might be so unfortunate as to hold them. Such an intention would have defeated the object sought to be secured by giving authority for their issue. Nor can we think that the Legislature intended to set a trap for purchasers, and lead them to suppose they were obtaining valuable securities, when, in fact, they would obtain

what was worth next to nothing. The statute justifies no implication of any such legislative intention."

If then, under a statute providing for a special tax to pay county bonds, no implication arises that such tax is exclusive of other ordinary means of payment, then *a fortiori* surely, the provison of a mere pledge of the stock for which the bonds are issued, cannot be held to imply that such pledge was intended to be the creditors' only source of payment. The injustice and absurdity of such a construction, so clearly pointed out by this Court in the case last cited, become far more flagrant when such a construction is applied to the present case.

But Judge Billings argues that the implication that the Legislature intended the bondholder should look for payment solely to the stock, is strengthened by a reference to certain other statutes of Louisiana; and he refers to the provision of the Act of 1852, already cited in this argument, that "no ordinance (of the city of New Orleans) creating a debt or loan, shall be valid, unless for some single object, or work, distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or the debt incurred." He also refers to the Act, already cited, of 1853, which provided that "the police juries of the several parishes of this State, and the constituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

From these references Judge Billings draws the conclusions, that since these statutes "struck with nullity," all obligations of cities unless the ordinance creating the same, fully provided for their payment, and since the levying of a tax was one means of payment contemplated by the Legislature, the failure of a "contemporaneous legislature," in authorizing the subscription to the stock, in the present instance, and the issue of bonds therefor, to make provision for taxation to pay the principal of the bonds, and "the insertion in the ordinance of other means of payment, which appear to have been deemed abundantly adequate," repels the influence that taxation was intended.

Judge Billings is in error in saying that the ordinance contains a provision for other means of paying the principal of the bonds. The provision to which he refers, the pledge of the stock, is contained only in the act of the Legislature, authorizing the subscription by the city, and prescribing the form of the ordinance.

He appears to be in error also, in referring to the legislature which passed the act authorizing the issue of the bonds now in question, as "contemporaneous" with the legislature which passed the acts of 1852 and 1853 which he cited. The legislature of 1854 was, in no sense, contemporaneous with the legislature of 1852 or of 1853. The legislature of 1852 was the *fourth* legislature under the constitution of 1845. The legislature of 1853, was the *first* legislature under the constitution of 1852; and the legislature of 1854 was the *second* legislature under the same constitution,—a body, therefore, subsequent to and distinct from either the legislature of 1852 or 1853.

The argument of Judge Billings, put in plainer form, is, that because the city charter passed in 1852, provided that no ordinance creating a debt, should be valid unless it provided means for the full payment of the debt, and because a like provision was made as to all incorporated towns and cities by the general statute of 1853, therefore the omission of such a provision in the present ordinance, and the pledge of the stock by the statute, indicates that the pledge was regarded as a full provision for payment to the exclusion of taxation.

Upon this argument it is to be observed that the statutes of 1852 and 1853, were, in no sense, and to no extent limitations on the power of the Legislature to authorize cities and towns, to create debts upon other conditions than those named in said Acts. The limitation of these Acts was upon cities and towns, not upon future Legislatures or the future action of the same Legislature.

When, therefore, the Legislature in 1854 by special Act, authorizes the present subscription and issue of bonds, we are to look to this Act for the authority of the city and not to previous Acts. It does not follow because, as a general rule, the Legislature saw fit to prohibit cities and towns from contracting debts, on their own motion and responsibility, without expressly providing the means of payment, that the Legislature might not feel warranted to specially authorize the contracting of a particular obligation without such express provision for payment.

It will be found also, upon examining the Act of 1854, that it contains in its second section full details in respect to the contents of the ordinance to be passed by the city in carrying out the authority conferred by the Act. From the enumeration of these details the presumption clearly is that the Legislature made all the requirements which it deemed needful.

When, therefore, by the Act of 1854, the Legislature authorized the city to create the present debt and provided in detail for the ordinance to carry such authority into execution, that Act must be held to stand unaffected by previous acts and be construed in the light of its own terms, as a free exercise of legislative power.

Stating our views upon this branch of the argument, in a condensed form, we say: the special authority conferred by the Acts of 1854, Nos. 108 and 109, to subscribe for the stock of the railroad companies and to issue bonds in payment, and the specification in detail in said Acts of the several provisions to be incorporated in the ordinances authorizing the subscriptions, operate, *pro tanto*, as a repeal of all previous limitations which would have rendered such subscriptions invalid, whether such limitations are found in the charter of the city or in other statutes of the State.

Butz v. Muscatine, 8 Wall., 575.
Amey v. Allegheny, 24 How., 364.
Commonwealth v. Pittsburg, 34 Penn. St., 496.
Commonwealth v. Commissioners, 40 Penn. St., 348.
Commonwealth v. Perkins, 43 Penn. St., 400.
Fosdick v. Perrysburg, 4 Ohio St., 472.
Assessors v. Commissioners, 3 Brews., 333.

In *Butz v. Muscatine* (*supra*), it was held that the limitation in the charter of the City of Muscatine, which authorized the City Council to levy a tax not exceeding one per cent. in any one year, is a limitation touching the exercise of the power of taxation "in the ordinary course of municipal action," and does not forbid a higher levy whenever necessary to comply with later statutory provisions.

In *Amey v. Allegheny City* (*supra*), an act of the legislature passed in 1850, provided that the debt of the City of Allegheny should not exceed $500,000, exclusive of a subscription of $200,000 previously made by special authority of the Legislature, to the capital stock of the Pennsylvania Railroad Company.

By each of two acts passed in 1852, the city was authorized to subscribe for stock in the same railroad company and issue bonds therefor, to the extent of $200,000, in excess of the limitation fixed by the Act of 1850.

It was contended that the latter subscriptions were forbidden by the Act of 1850.

The Court held that the obvious meaning of the Act of 1850 was, that the City Council should not exceed the limit fixed, but not that the Legislature might not authorize an increase beyond that amount, and that the same political power which authorized the first subscription could authorize further subscriptions without reference to the limitations fixed by the Act of 1850.

In *Commonwealth v. Pittsburg* (*supra*), the charter of the City of Pittsburg limited the levy of taxes to half a cent. on the dollar, except under certain conditions, which, in this instance, had not been complied with. A subsequent act of the Legislature authorized a subscription to the stock of a railroad company and the issue of bonds therefor. The payment of the interest on said bonds rendered necessary a levy greater than that permitted by the city charter.

The Court held that the power given by the act authorizing the subscription was a repeal, *pro tanto*, of the former restriction.

"When," says the Court, "the Legislature gave the power, it gave with it everything which was

necessary for its exercise, and repealed every statutory prohibition of its enjoyment."

In *Commonwealth v. Commissioners* (*supra*), the proviso to section 7 of the Act of April 15, 1834, was, "Provided that no tax in any county shall, in any one year, exceed the rate of one per cent. on every dollar of the adjusted valuation."

It was held (1) that this is a limitation on the taxing officers merely, and in no way controls the Legislature, who may repeal the same, expressly or impliedly, by legislation inconsistent therewith."

(2). That the grant of authority by the Legislature to County Commissioners to create a debt, and to provide for the payment of the interest thereon, is an enlargement of the power to assess taxes to meet the demand, and an implied repeal of any conflicting statutory limitation.

(3.) That, therefore, the Act of 1843, authorizing subscriptions by Allegheny County to the stock of a railroad company, and the Act of 1853, giving authority to borrow money to pay such subscriptions, and to make provision for the payment of the same, virtually repeals the proviso of 1834, so far as it conflicts with their provisions, and empowers the Commissioners to levy taxes sufficient to meet the obligations incurred under said authority.

The Court says:

"The only question before us is the effect of the grant of authority to create the debt and to provide for the payment of interest in view of this limitation. Did it enlarge the power to assess taxes to meet the demand? That it did, we cannot doubt. The limitation was upon the taxing officers. It

was made to control them, and could not control the Legislature. Nothing but a constitutional mandate could have that effect, and as it must be conceded now, there was no such barrier in the way of legislation on the subject of municipal corporations, that, therefore, was not in the way. The limitation was but the expression of the sovereign will towards subordinate authorities; it had no effect on the Legislature itself. There being no constitutional prohibition to a change of the law on this subject, the Legislature was free to dispense with the limitation entirely, or so far as to include within it the suspended duty of providing for new liabilities. This could as well be done by requirements totally inconsistent with the limit fixed, as by express provision. When not expressed, it may be implied, whenever it is clearly and necessarily incident to the duty enjoined in the legislative mandate or authority."

We submit, therefore, that there is nothing in the previous statutes referred to, nor in the pledge of the stock, which, in this case, affects the ordinary implication that payment by taxation was intended.

Second.—Is there any restriction upon the power of the City of New Orleans to tax for the payment of the bonds?

Judge Billings discusses the question whether the duty or power to levy this tax has been committed by the legislature to the city administration; he examines the charters of 1805 and 1836, and concludes that no express power is given to levy the tax.

But the question to be determined is not whether express power has been given, but whether the power has been expressly denied.

It has already been seen that in the absence of any denial or restriction of power to tax, the authority to a municipality to create a debt implies the power and duty to pay it by taxation.

"It is to be inferred that when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

Loan Association v. Topeka, 20 Wall., 655.

"The authority to contract a debt carries with it the power to provide the means of payment by taxation, if necessary."

Ex parte Parsons, 1 Hughes, 282.

In *United States v. County of Clark*, 95 U. S., 769, it appears that the County Court was limited in its power to levy taxes to an amount not exceeding, in addition to the special tax in question, a rate of one-half of one per cent., and the return to the alternative writ averred that a tax reaching this limit had been fully levied and collected. The Court held this a good defense.

But it is worthy of notice here that in the last named case the Court says, in concluding its opinion:

"In thus deciding, we are not to be understood as maintaining all that is averred in the defendants' return to the alternative writ. We do not assert that the relator is without remedy against the county, or that his remedy is restricted to a resort

to the proceeds of the special tax. It is enough for this case that the judgment of the Circuit Court was correct on the pleadings."

And in the case of the same relator and upon the same class of bonds—*United States v. County of Clark*, 96 U. S. 211—this Court subsequently, as we have already seen, held that the bonds were not restricted for payment to the special tax levied, but were entitled to payment also out of the general funds of the county.

But no limitation or restriction of this kind existed at the time of the issue of the bonds now in question; the act itself authorizing the bonds contains no such restriction; there is no such restriction in any general statute of the State.

In the city charter of 1856, passed after the issue of these bonds, a limitation to one dollar and fifty cents on one hundred dollars of valuation, is fixed, but with the proviso that such tax shall be sufficient to pay the interest on the railroad bonds issued by the city

In the city charter of 1870, it is provided that the tax in the aggregate shall not exceed one dollar and seventy-five cents on the one hundred dollars of valuation.

But it is not alleged in the answer in the present case, that the statutory limit of taxation has been reached. Nor is it alleged, nor does it appear, that such limitation or any other limitation existed at the time when these bonds were issued. If such limitation did not then exist, no subsequent limitation can be made to affect the power or duty of the city in respect to the present bonds.

Von Hoffman v. Quincy, 4 Wall., 535.
Butz v. Muscatine, 8 Wall., 575.
Milner's Adm'r v. Pensacola, 2 Woods 641, and cases there cited.
Commissioners v. Rather, 48 Ala., 446, and cases there cited.

If, then, there was no express restriction upon the power of the city to tax at the time of the issue of the bonds; and if no other adequate means of payment is provided; the conclusion will be that the act which authorized the City of New Orleans to subscribe for stock and issue bonds therefor, by implication authorized the levying of taxes for the payment of the bonds, and that the courts of the United States will enforce the levy of such taxes by the writ of mandamus for the purpose of carrying into effect their judgments.

It is proper to cite here the decision of Judge Woods in *Ranger vs. City of New Orleans*, 2 Woods, 128. In this case the relator in *United States ex. rel., Ranger vs. City of New Orleans*, decided by Judge Billings, having obtained a judgment upon certain bonds and coupons similar in all respects to those now in question, filed a bill in equity in the United States Circuit Court, praying an injunction against the city (1) from diverting to other purposes the tax collected for paying interest on his bonds, (2) from receiving city scrip for uncollected taxes for previous years, and (3) from enforcing what was known as the "premium bond" plan.

Judge Woods in denying the motion for an injunction *pendente lite*, except as to the diversion of funds collected specifically for the interest on the complainant's bonds, says :

"It seems to me that the complainant has mistaken his remedy. He has his bonds and judgment upon them, and he has a right to have a tax levied to pay the principal and interest upon these bonds. That is the only right he has, and that right is only to be secured by the common law remedy of *mandamus*."

Upon the points, that the power to tax is implied in the power to contract debts, and that the power to tax existing at the time of contracting a debt cannot subsequently be taken away, to the injury of the creditors, an unreported decision of Judge Woods in 1877, is of interest and value--*Sibley v. City of Mobile.*

In this case the relator applied for a writ of mandamus to compel a levy of tax by the city to pay a judgment recovered upon coupons of bonds of the City of Mobile. The city set up want of express authority to levy the tax, and a subsequent act of the Legislature whereby the proceeds of all city taxes up to the full constitutional limit of taxation, were directed to be applied to other objects than the payment of relator's bonds.

Judge Woods, says:

"The act of the Legislature of January 17, 1870, conferred ample authority upon the City of Mobile to issue the bonds from which the coupons of relator have been detached and even without express authority to that effect, implied authority to levy a tax for their payment.

See 20 Wall., 36; 36 Ala., 439; 45, Ala., 730; 2 Woods, 230.

Besides the implied power, there is an express agreement on the part of the city, set out in the ordinance of June 25th, 1869, and afterwards ratified by the Legislature, by the act of January 17, 1870, by which the city bound itself to appropriate sufficient money from the treasury to pay the interest, and reserved to itself the right to raise the same by special tax, which remedies were also approved by the same act of Legislature. The city acted upon this authority, and as its answer shows, for several years levied a special tax to pay the interest on the bonds issued to the Mobile and Alabama G. T. R. R.

Company. The authority to levy a tax for the payment of the interest on these bonds carries with it the duty to make the levy. The power to levy the tax, is in the nature of a trust for the benefit of the holder of the bonds. The right of the creditor and the ends of justice demand that it shall be exercised in favor of affirmative action, and the law requires it. *City Galena v. Amy*, 5 Wall, 780; *High on Ext. Rem.*, § 397, 4 Wall, 334; *Supervisors v. U. S.*

When the bonds, which relator holds, were issued, the law authorized, and in effect, required the levy of a tax to pay the interest thereon as it accrued. This law formed a part of the contract as much as if it had been written on the face of the bonds. 1 Wall., 175; 4 Wall., 417; 15 Wall, 610; 48 Ala., 446; 2 Woods, 641.

The City of Mobile, by its ordinance, confirmed by Act of the Legislature, has agreed to pay the interest on these bonds semi-annually, either out of the general revenue, or by special tax. This contract is, of course, subject to the constitutional limit upon the taxing power of the city restricting it to a levy, not to exceed two per cent. per annum. The question is, therefore, presented by the demurrer to the answer, whether it was competent for the Legislature, by an act passed subsequent to the issue of the bonds, to exhaust all the taxing power of the city, and direct its application of the proceeds of such taxation to other objects, to the exclusion of the issue of bonds of which relator holds a part. After authorizing the city to issue these bonds, and after approving the contract of the city to pay the interest semi-annually, either by a general or a special tax, can the Legislature authorize and direct that all the taxing power of the city shall be exercised for the benefit of the holders of other bonds, to the exclusion of these? In my

judgment, such an act would be a violation of the rights of the holders of the bonds thus excluded, and an impairment of their contract with the city of Mobile. These bondholders are entitled to have all the taxing power of the city within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the city with them. When the power is exercised the current expenses of the city must be paid out of the funds so raised, and as to the residue, the relators are entitled to share *pro rata* with the other creditors of the city, and neither the city nor the Legislature have the power to appropriate the taxing power of the city for the exclusive benefit of a class, while the relators have a contract in effect declaring that a part of the taxing power of the city shall be exercised for their benefit."

It is to be observed, in conclusion, that the present demand is not for the levy of a special tax to pay the relator's judgment, but for the levy and collection of "a tax upon the real and personal property situated within the limits of said city, sufficient to pay said judgment."

There is, therefore, no question raised here, as was raised in *Supervisors vs. United States*, 18 Wall., 77, of the right of the relator to a special tax, in distinction from his right to the levy, in common with other taxes, of an amount sufficient to pay his judgment.

Upon the whole case, then, as now presented, we submit that the right of the plaintiff in error to the writ asked for, is clear.

First.—He has a judgment upon his bonds against the city.

Second.—At the time the bonds were issued, there was no limitation upon the amount of taxes which might be raised by the city; and no subsequent limitation can affect the bonds now in question.

Third.—In the absence of an express grant of authority to the city to levy a tax to pay the principal of the bonds, such authority and a corresponding duty to exercise it, arises by implication from the grant of authority to contract the debt.

Fourth.—The "pledge" of the stock subscribed for, for the redemption of the bonds, was, according to the legal characteristics of a pledge as well as all reasonable indications and inferences of the intention of the parties, a mere collateral security for the payment of the debt; and this "pledge" cannot be construed to be an adequate, and especially not the only means of payment intended to be provided.

Fifth.—The express authority to issue the bonds, conferred by the Acts of the Legislature, and the detailed specification therein of the several provisions of the ordinances to be passed in execution of such authority, operate as a repeal, *pro tanto*, of all previous conflicting or inconsistent legislation.

Sixth.—The Court below ought, therefore, to have sustained the demurrer of the plaintiff in error to the answer of the city, and to have awarded the writ of mandamus directing the Mayor and Administrators to levy a tax sufficient to pay the judgment.

D. H. CHAMBERLAIN,

WM. B. HORNBLOWER,

Of CHAMBERLAIN, CARTER & EATON,

Counsel for Plaintiff in Error.

UNITED STATES SUPREME COURT.

No. 157.

THE UNITED STATES Ex Rel., CHARLES PARSONS,

vs.

THE CITY OF NEW ORLEANS.

Brief for Defendant.

This case involves the same issue as No. 150, to the brief in which we refer—and ask for the affirmance of the judgment.

Respectfully submitted,

B. F. JONAS,
H. C. MILLER.
Of Counsel for City.

Comment upon the Legislation of March 12, 1852, and Ordinance based on same, Introduced in Relator's Brief and Appendix thereto.

The Relator seeks to strengthen his demand by reference to the act of 12th March, 1852, and the ordinance of the Common Council enacted to authorize a subscription by the city to the railroad, to be paid by taxation of 3 per cent. on all the landed estate of the city, it being computed that rate per cent. of tax would be sufficient to pay the amount of the subscription. But difficulties presented themselves, arising from the delay in the collection of the taxes, and the assistance contemplated to be afforded the Railroad Company was deemed of urgent importance, hence the act of 1854, which substituted a new form of affording the desired aid. That act provided that the subscription should be paid not by taxation but by bonds of the city, to be received by the Railroad Company at par. Instead of providing for the payment of the whole amount of the subscription by taxation, the act of 1854 made provision for the payment of the interest by taxation, and made no other provisions for the payment of the principal of the bonds, except by the pledge of the stock. (Section 3d.) The act of 1854 treated the subscription although authorized by the general act of 1852 and the ordinance of the Counsel of same year as a subscription made under the act of 1854, for in its first section it declared it shall be lawful for the Common Council to make the subscription. As to the tax authorized by the ordinance of 1852, it was completely superseded by the act of 1854, by repealing the ordinance which composed it, except reserving the liability of the city to collect and pay over to the Railroad Company the portion of the tax for the year 1853 not collected and paid over. With that proviso the tax under the ordinance of 1852 was totally superseded, and its repeal was accomplished before the bonds were issued in 1854. No support to the Relator's demand can be derived from this ordinance of 1852, and the tax it imposed. The act of 1854 substituted bonds and an interest tax as the mode of assistance, and for the payment of the bonds it pledged the stock.